Supreme Court, U. S.
FILED
JUL 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-3

CURTIS PARHAM,

Appellant,

versus

ELLIS FRANKLIN HUGHES,

Appellee.

On Appeal from the
Supreme Court of The State of Georgia

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The Opinion of the Supreme Court of Georgia is reported at *241 Ga. 198*. The unofficial citation is not available at this point. A copy of the Opinion of the Supreme Court of Georgia is attached hereto and identified as Appendix "A".

JURISDICTION

Jurisdiction in this Court is invoked pursuant to *28 United States Code 1257(2)* since there is drawn in question the validity of a state statute contended to be

repugnant to the United States Constitution and the decision of the Georgia Supreme Court was in favor of the validity of that statute. The trial court below concluded that the statute in question, Georgia Wrongful Death Statute, *Georgia Code Annotated* §105-1307, was repugnant to the Due Process and Equal Protection Clauses of the *5th* and *14th Amendments* to the *United States Constitution*. The trial court concluded that the statute violated the Due Process and Equal Protection Clauses of the United States Constitution by allowing the mother of an illegitimate child to sue for the wrongful death of that child while denying that right to the father of the illegitimate child. A copy of the trial court's Opinion is attached hereto and identified as Appendix "B".

The Georgia Supreme Court reversed the decision of the trial court, upholding the validity of the Georgia Wrongful Death Statute and concluded that it did not constitute a denial of equal protection or violation of due process by allowing the mother of an illegitimate child to sue for its wrongful death and denying that right to the father even in cases like the present one where the natural mother was deceased and the natural father had supported the child from its birth until its death, acknowledged the child by the execution of its Birth Certificate and maintained constant contact with the child through almost daily visitation from its birth until its death.

The Opinion of the Georgia Supreme Court from which this appeal is taken is dated April 4, 1978, and was entered on the 4th day of April, 1978. A Motion for Rehearing in the matter was filed on April 12, 1978, and the Motion for Rehearing was denied on April 19,

1978. A copy of the Denial of the Motion for Rehearing is attached hereto and identified as Appendix "C".

A Notice of Appeal was filed on the 28th day of April, 1978, in the Supreme Court of Georgia. A copy of said Notice of Appeal is attached hereto and identified as Appendix "D".

As mentioned previously, the statutory provision conferring jurisdiction on this Court is 28 *United States Code* 1257(2) since the case involves the question of the validity of a state statute challenged as being repugnant to the *Constitution* of the United States and the Decision of the Georgia Supreme Court was in favor of the validity of this statute.

For cases which sustain this Court's jurisdiction in this matter, see: *Glona v. American Guaranty & Liability Insurance Company*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 63 (1968); *Weber v. Aetna Casualty & Surety Company*, 406 U.S. 164 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Trimble v. Gordon*, 97 S.Ct. 1459 (1977); *Gomez v. Perez*, 409 U.S. 535 and *Frontiero v. Richardson*, 411 U.S. 677 (1973).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A.

The case involves the Due Process and Equal Protection Clauses of the *5th* and *14th Amendments* to the *United States Constitution*.

B.

The case also involves *Georgia Code Annotated* 105-1307, which states:

> *105-1307 Homicide of child.*
>
> "A mother, or, if no mother, a father, may recover for the homicide of a child, minor or sui juris, unless said child shall leave a wife, husband or child. The mother or father shall be entitled to recover the full value of the life of such child. In suits by the mother the illegitimacy of the child shall be no bar to a recovery.

C.

The case incidentally involved *Georgia Code Annotated* 74-202, which imposes the primary support obligation for an illegitimate child on the father of that child and states:

> *74-202 Father's obligation to support.*
>
> "The father of an illegitimate child shall be bound to maintain him until said child reaches the age of eighteen, marries or becomes self-supporting, whichever occurs first. The obligation shall be good consideration to support a contract by him. He may voluntarily discharge this duty; if he shall fail or refuse to do it the law will compel him: provided however, that the Superior Court shall have

> the power, upon petition of the father to require the mother of an illegitimate child to contribute to such support upon a determination that the financial circumstances of both the father and the mother are such that justice and equity require the mother to share in or have responsibility for such support."

QUESTIONS PRESENTED

WHETHER GEORGIA CODE ANNOTATED §105-1307 VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS BY ALLOWING THE MOTHER OF AN ILLEGITIMATE CHILD TO RECOVER FOR ITS WRONGFUL DEATH BUT DENYING THAT RIGHT TO THE FATHER OF AN ILLEGITIMATE CHILD WHERE:

1) THE NATURAL MOTHER OF THE CHILD IS DECEASED;

2) THE FATHER OF THE ILLEGITIMATE CHILD ACKNOWLEDGED HIS PATERNITY OF SAID CHILD BY EXECUTION OF THE CHILD'S BIRTH CERTIFICATE, SUPPORTED THE CHILD FROM ITS BIRTH UNTIL ITS DEATH, MAINTAINED CHARGE ACCOUNTS AT GROCERY STORES FOR THE ADDITIONAL SUPPORT OF SAID CHILD AND VISITED WITH THE CHILD ON ALMOST A DAILY BASIS FROM ITS BIRTH UNTIL ITS DEATH;

3) THE PRIMARY SUPPORT OBLIGATION FOR AN ILLEGITIMATE CHILD IS PLACED UPON THE FATHER OF THAT CHILD AND THE FATHER HAS, IN FACT, COMPLIED WITH THAT SUPPORT OBLIGATION.

II.

WHETHER THERE ARE LEGITIMATE STATE INTERESTS WHICH JUSTIFY ALLOWING THE MOTHER OF AN ILLEGITIMATE CHILD TO SUE FOR ITS WRONGFUL DEATH AND DENYING THAT RIGHT TO THE FATHER OF SAID CHILD AND WHETHER GEORGIA CODE ANNOTATED 105-1307 PROMOTES ANY LEGITIMATE STATE INTERESTS WHICH MAY EXIST.

III.

WHETHER THE GEORGIA WRONGFUL DEATH STATUTE WHICH ALLOWS THE MOTHER OF AN ILLEGITIMATE CHILD TO RECOVER FOR ITS WRONGFUL DEATH BUT DENIES THAT RIGHT TO THE FATHER CONSTITUTES IMPERMISSIBLE DISCRIMINATION BASED ON SEX.

STATEMENT OF THE CASE

(A) Statement of the Facts:

The Appellant herein was the natural father of Lemuel Parham, a minor child, who was killed in an automobile accident (R-25). The child's natural

mother, Cassandra Moreen, was killed in the same accident (R-25). While Appellant and his child's natural mother were never married, the Appellant signed the child's Birth Certificate acknowledging his paternity, (R-24), and the child utilized Appellant's name (Parham), as opposed to the natural mother's name (Moreen).

In addition, it was established without contradiction and adopted as Findings of Fact by the trial court that the Appellant paid the birth expenses for his minor child and supported his minor child from its birth until its death (R-23). It was established without contradiction and made a part of the trial court's Order, that the Appellant had, at all times, acknowledged the child as his own and was, at all times, acknowledged by the child as its father; and in addition to paying child support the Appellant maintained and paid charge accounts at grocery stores for food and other necessities to insure the support of this child and that the Appellant visited regularly with the child and, in fact, saw him every day and every weekend and had the child with him for many complete weekends (R-23).

All of the preceding facts were adopted as Findings of Fact by the trial court as revealed in the Order of the trial court attached hereto and identified as Appendix "B".

Following the death of his minor child in an automobile accident which also claimed the life of the child's mother, Appellant filed this original action seeking to recover for the wrongful death of his minor child in the Superior Court of Richmond County,

Georgia, on February 7, 1977, naming the Appellee herein as defendant and charging said Appellee with negligence in the death of his minor child and seeking to recover for that death (R-3 through 6). An explanation of the proceedings which account for the present status of the case is contained below.

(B) The Proceedings Below - How the Federal Questions Were Raised and Decided:

As stated above, the Appellant filed this original complaint seeking to recover for the wrongful death of his child on February 7, 1977. The defendant, Appellee herein, filed his responsive pleadings to the complaint (R-8 through 9). The Appellee herein then filed a Motion for Summary Judgment against the Appellant contending that *Georgia Code Annotated* §105-1307 prevented the appellant from recovering for the wrongful death of his illegitimate child. *Georgia Code Annotated* §105-1307 (1887 Georgia Laws, 43, 45; 1952 Georgia Laws, 54) provides:

> "A mother, or if no mother, a father, may recover for the homicide of a child, minor or sui juris, unless said child shall leave a wife, husband or child. The mother or father shall be entitled to recover the full value of the life of such child. In suits by the mother, the illegitimacy of the child shall be no bar to a recovery."

Appellee relied on this statutory provision which allows the mother of an illegitimate child to sue for its wrongful death but denies that right to the father (R-14).

The trial court, Superior Court of Richmond County, Georgia, denied Appellant's Motion for Summary Judgment (R-25 through 29, and Appendix "B"). In so doing, the court concluded that the Appellant herein was the proper party to maintain an action for the alleged wrongful death of his minor child and found *Georgia Code Annotated* §105-1307 to be in violation of the Due Process and Equal Protection Clauses of the United States Constitution. In its Order the court made Findings of Fact and Conclusions of Law. The Order is set forth in its entirety as Appendix "B" attached hereto. The court found the Georgia Wrongful Death Statute deficient in three regards. The court concluded:

1.

"To the extent that the Georgia Wrongful Death Statute conditions the right of either parent to sue for the wrongful death of its child upon the legitimacy or illegitimacy of the child, that Statute constitutes a denial of Equal Protection and Due Process within the meaning of the *5th* and *14th Amendments* to the *United States Constitution.*"

2.

"To the extent that the Georgia Wrongful Death Statute purports to allow the mother of an illegitimate child to maintain an action for the wrongful death of that child and denies that right to the father of an illegitimate child, that Statute constitutes a denial of Equal

Protection and Due Process in violation of the *5th* and *14th Amendments* to the *United States Constitution.*"

3.

"Where the state imposes the primary support obligation for illegitimate children upon the father of those children and where the father of an illegitimate child in fact has provided some level of support for that child and has acknowledged his paternity by execution of the birth certificate and has in every respect treated the child as his own, the State cannot constitutionally deny that father the right to maintain an action for the wrongful death of his child where the mother of said child is also deceased."

The Court concluded in its Findings of Fact that although the Appellant, as the natural father of the deceased minor child, had never married the natural mother, that Appellant had executed the Birth Certificate acknowledging his paternity of the child and had paid the birth expenses for the birth of said child and had regularly supported the child from its birth until its death (See Appendix "B"). The Court further found that the Appellant had, at all times, acknowledged the child as his son and was at all times acknowledged by the child as his father, and that in addition to paying child support, the Appellant had maintained charge accounts at grocery stores for food and other necessities to further insure the support of this child and had visited regularly with the deceased minor child and, in fact, saw him virtually every day.

Following the Order of the trial court finding the Georgia Wrongful Death Statute in violation of the Due Process and Equal Protection Clauses of the United States Constitution, the Appellee herein was granted a Certificate of Immediate Review by the trial court (R-30). The Georgia Supreme Court granted the Appellee's Application for Interlocutory Appeal on October 13, 1977, (R-1). On April 4, 1978, the Georgia Supreme Court reversed the decision of the trial court, concluding that the Georgia Wrongful Death Statute does not violate the Due Process or Equal Protection Clauses of the United States Constitution. The Supreme Court failed to address the issue of sex-based discrimination, although that issue was raised and argued in Appellant's Brief (See Appendix "A"). In its decision the Georgia Supreme Court cited four allegedly valid state interests promoted by the classification in the Georgia Wrongful Death Statute which allows the mother to sue for the wrongful death of an illegitimate child but denies that right to the father. The Appellant respectfully submits that two of those asserted state interests have been rejected by this Court in recent decisions and the other two which center around insuring a standard of morality and promoting legitimate family relationships, cannot possibly be promoted by a classification which rewards one party to an illegitimate act and punishes the other. (For discussion of the Georgia Supreme Court's asserted state interests, see Appendix "A").

Following this decision by the Georgia Supreme Court, the Appellant herein's Motion for Rehearing was denied on April 19, 1978, (See Appendix "C"). On the 28th day of April, 1978, Appellant herein filed a

Notice of Appeal to the United States Supreme Court. Appeal was filed pursuant to 28 *United States Code* 1257(2) since the case draws into question the validity of a state statute on the grounds that it is repugnant to the United States Constitution and the Decision of the Georgia Supreme Court was in favor of the validity and constitutionality of that statute (Appendix "A". A copy of Appellant's Notice of Appeal is attached hereto and identified as Appendix "D".)

(C) **Why The Federal Questions Are Substantial:**

The Appellant contends that the State of Georgia cannot, consistent with the Due Process and Equal Protection Clauses of the United States Constitution, allow the natural mother of an illegitimate child to recover for the wrongful death of that child and deny that right to the father, especially where the natural mother is deceased and the natural father has acknowledged his paternity by executing the Birth Certificate, paid the birth expenses on the child, supported the child from its birth until its death, maintained charge accounts for the additional support of the child and visited with the child on virtually a daily basis from its birth until its death (R-23 through 27). The trial court agreed with Appellant (See Appendix "B"). The Georgia Supreme Court reversed asserting four valid state interests allegedly promoted by this classification (See Appendix "A"). The federal questions raised by this Appeal are substantial because two of the legitimate state interests asserted by the Georgia Supreme Court have been expressly rejected by this Court in recent decisions and the remaining two are absolutely not promoted and could

never be promoted by the classification existing in the statute.

Initially, there is the assertion by the Georgia Supreme Court that the state has a legitimate interest in forestalling potential problems of proof of paternity in wrongful death actions (See the Georgia Supreme Court Opinion, Appendix "A", pp. 3a-4a). With regard to problems of proof of paternity in illegitimacy cases this Court has stated in *Gomez v. Perez*, 409 U.S. 535 (1973):

> "We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an inpenetrable barrier that works to shield otherwise invidious discrimination." (Page 539).

In the 1977 case of *Trimble v. Gordon*, 97 S.Ct. 1459 (1977), this Court stated:

> "Difficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate."

Likewise Appellant submits that difficulties and problems of proving paternity does not justify the total denial of the legal relationship between a father and his illegitimate child, especially where that relationship existed in fact as documented in the present matter.

Finally, in discussing many of the decisions of the United States Supreme Court, the Fifth Circuit Court of Appeals, in the case of *Beaty v. Weinberger*, 478 F.2nd 300 (5th Cir. 1973), concluded:

> "What is significant about these cases is the Court's implicit, if not explicit, disavowment of the notion that difficulties of proof are a sufficient or indeed rational basis for discriminating against illegitimates."

With regard to proving paternity, the Fifth Circuit goes on to say:

> "That problem, however, concerns burden of proof. Plainly the problem of proving parentage was viewed as a procedural matter which, of itself, was not sufficient justification for the state to formulate classifications between legitimates and illegitimates based upon it."

While it may be somewhat more difficult to establish paternity than maternity for an illegitimate child, Appellant respectfully submits that the difficulty does not warrant totally excluding one natural parent from benefits granted to another natural parent based on illegitimacy. As this Court suggested in *Trimble v. Gordon*, supra:

> "The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their father's estates than required either for illegitimate children claiming un-

> der their mother's estates or for legitimate children generally." (Page 1465)

Secondly, the Georgia Supreme Court justified its Opinion by reasoning that the state had an interest in encouraging the fathers of illegitimate children to take steps to legitimate the children and that the Appellant in the present matter had the option of legitimating the child but failed to do so. In the first instance, the Court fails to explain why the state does not have a policy of encouraging mothers to legitimate illegitimate children and why therefore mothers of illegitimate children are allowed to bring actions for wrongful death without regard to legitimation. No justification is given for placing the entire responsibility for legitimation upon the father. More importantly, this Court has stated in a very recent decision, that a statute in violation of the Equal Protection Clause cannot be salvaged by the fact that alternatives exist which would allow one to avoid the impact of the unconstitutionality of the statute. In the 1977 case of *Trimble v. Gordon*, supra, this Court ruled that Illinois could not, consistent with the Equal Protection Clause, deny an illegitimate child the right to inherit by intestate succession from its father when it could so inherit from its mother.

The Illinois Supreme Court in *Trimble v. Gordon*, supra, had argued that the father of the illegitimate child could have left a Will, could have legitimated the daughter by marrying the mother and could have given the daughter the status of a legitimate child by stating in his acknowledgement of paternity, his desire to legitimate her. This is precisely the position

taken by the Georgia Supreme Court in the present matter. This Court rejected these contentions and concluded:

> "By focusing on the steps that an intestate might have taken to insure some inheritance for his illegitimate children, the analysis loses sight of the essential questions: the constitutionality of discrimination against illegitimates in a state intestate succession law. If a decedent had written a Will devising property to his illegitimate child, the case no longer would involve intestate succession law at all. Similarly, if the decedent had legitimated the child by marrying the child's mother or by complying with the requirements of some other method of legitimation, the case no longer would involve discrimination against illegitimates. Hard questions cannot be avoided by hypothetical reshuffling of the facts." (Page 1467)

The Court went on to conclude:

> "Traditional equal protection analysis asks whether this statutory differentiation on the basis of illegitimacy is justified by the promotion of recognized state objectives. If the law cannot be sustained on this analysis, it is not clear how it can be saved by the absence of an insurmountable barrier to inheritance under other and hypothetical circumstances."

This Court has made it abundantly clear that the presence or absence of alternatives for avoiding the

impact of statutes challenged on equal protection grounds is immaterial. Consequently, in the present case the fact that the Appellant could have legitimated the child is of no consequence in deciding the constitutional validity of this challenged provision. As the Supreme Court stated in *Stanley v. Illinois*, 405 U.S. 645 (1972):

> "At the outset, we reject any suggestion that we need not consider the propriety of the dependency proceedings that separated the Stanleys because Stanley might be able to regain custody of his children as a guardian or through adoption proceedings. The suggestion is that if Stanley has been treated differently from other parents, the difference is immaterial and not legally cognizable for the purposes of the Fourteenth Amendment. This Court has not, however, embraced the general proposition that a wrong may be done if it can be undone." (Page 647)

The final two legitimate state interests asserted by the Georgia Supreme Court have generally been considered valid state interests justifying certain classifications. The Georgia Supreme Court concluded that the State of Georgia has a legitimate interest in promoting legitimate family relationships and in setting a standard of morality (See the Georgia Supreme Court Opinion, Appendix "A", p. 4a). No one would contend that these are not worthy state interests. However, the Georgia Supreme Court totally fails to demonstrate how legitimate family relationships and

high standards of morality are promoted by allowing one party to the illegitimate act to recover for the wrongful death of the child, which was the product of that act, and denying that right to the other party to the illegitimate act. Is the State of Georgia's interests in promoting legitimate family relationships and high standards of morality limited to punishing males who participate in these illegitimate acts, while rewarding the females who participate by allowing the latter to recover and denying that right to the former?

In addition, as Justice Hill stated in his dissenting Opinion in the Georgia Supreme Court, attached hereto and identified as Appendix "E":

> "The majority fails to explain how the state's objective of promoting a legitimate family unit is furthered by denying the father of an illegitimate child an action for that child's wrongful death. The illegitimate child is already dead by the time the means chosen by the state comes into operation. The denial of a claim for a child's wrongful death does not promote the family as an institution for rearing that child in a timely or rational manner regardless of the level of scrutiny employed. The sanction adopted by the state is not suited and comes too late to motivate a father to provide care for his illegitimate child. It treats the father of an illegitimate child different from the mother of that same child and thus constitutes a denial of equal protection."

Appellant respectfully submits that for the foregoing reasons the federal questions presented by the

present appeal are substantial. This Appellant is before this Court as a father who had a documented relationship with his son which was as continuous and real and strong as the relationship of any legitimate father/child relationship. Despite the presence of a meaningful father/son relationship and an obvious loss, this father is denied the right to bring an action for the wrongful death of his son because the child was illegitimate while the child's mother is expressly given the right to bring that action. The Georgia Supreme Court has denied this natural father the right to recover for the death of his child even though the natural mother is deceased and even though the Appellant has continuously acknowledged and supported this child from its birth until its death. Appellant respectfully submits that *Georgia Code Annotated* 105-1307 is in violation of the Equal Protection and Due Process Clauses of the United States Constitution and constitutes sex-based discrimination.

DISCUSSION OF QUESTIONS PRESENTED

I.

WHETHER GEORGIA CODE ANNOTATED §105-1307 VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS BY ALLOWING THE MOTHER OF AN ILLEGITIMATE CHILD TO RECOVER FOR ITS WRONGFUL DEATH BUT DENYING THAT RIGHT TO THE FATHER OF AN ILLEGITIMATE CHILD WHERE:

1) THE NATURAL MOTHER OF THE CHILD IS DECEASED;

2) THE FATHER OF THE ILLEGITIMATE CHILD ACKNOWLEDGED HIS PATERNITY OF SAID CHILD BY EXECUTION OF THE CHILD'S BIRTH CERTIFICATE, SUPPORTED THE CHILD FROM ITS BIRTH UNTIL ITS DEATH, MAINTAINED CHARGE ACCOUNTS AT GROCERY STORES FOR THE ADDITIONAL SUPPORT OF SAID CHILD AND VISITED WITH THE CHILD ON ALMOST A DAILY BASIS FROM ITS BIRTH UNTIL ITS DEATH;

3) THE PRIMARY SUPPORT OBLIGATION FOR AN ILLEGITIMATE CHILD IS PLACED UPON THE FATHER OF THAT CHILD AND THE FATHER HAS, IN FACT, COMPLIED WITH THAT SUPPORT OBLIGATION.

The trial court, in its Findings of Fact and Conclusions of Law, made a determination that the State of Georgia imposes the primary support obligation for illegitimate children upon the father of these children (R-27, 28). The court was referring to *Georgia Code Annotated* §74-202, the text of which is set forth in an earlier portion of this Statement. That statute does indeed impose the primary support obligation for an illegitimate child on the father of that child. This position has also been sanctioned by the United States Supreme Court. See *Gomez v. Perez*, 409 U.S. 535 (1973). In addition, the Court below found that the father in this particular case, the Appellant herein, was in fact supporting the child, had acknowledged

the child since its birth, provided charge accounts in addition to regular support payments and visited with the child with an unusual degree of regularity (R-23 et seq). Based on the imposition of the primary support obligation upon the father and the actual support by the father in the present case, the trial court below concluded that the state cannot constitutionally deny the natural father of a child the right to sue for its wrongful death in these circumstances (R-28). The Georgia Supreme Court failed to address this contention and this portion of the trial court's Order in any regard.

The United States Supreme Court has considered the issue of classifications by states based on illegitimacy on numerous occasions. At the outset, Appellant submits that the present case is factually distinguishable from the most recent decision of this Court, *Quilloin v. Walcott*, United States Supreme Court Case No. 76-6372 (1978). In that case the Supreme Court refused to accord to the father of an illegitimate child the same veto powers for an adoption as are accorded to a divorced father. On the final page of this Court's Decision in that case, Mr. Justice Marshall stated:

> "Although Appellant was subject for the years prior to these proceedings to essentially the same child support obligation as a married father would have had, compare 74-202 with 74-105 and 30-301, he has never exercised actual or legal custody over his child and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection or care of the child."

That factual situation is in marked contrast to the present situation, where the trial court found and the record reflects, that the present Appellant maintained a meaningful relationship with his child from the birth of that child until its death (R-23 through 27).

Appellant also refers the Court to the Decision of this Court in *Glona v. American Guaranty & Liability Insurance Company*, 391 U.S. 73 (1968). In that case this Court found the Illinois Wrongful Death Statute to be in violation of the United States Constitution. By construction of Louisiana courts, the Louisiana Statute had excluded both the mother and father of illegitimate children from bringing actions for the wrongful death of those children. The issue decided by the Court is best stated in the words of the Court in Footnote 3 of that Opinion:

> "... As the Court of Appeals noted, Article 2315 of the Louisiana Civil Code, providing the wrongful death recovery, gives a cause of action to 'the surviving father and mother of the deceased, or either of them ...' The statute does not state 'legitimate' father or 'legitimate' mother, but the Louisiana courts have held that a decedent must be legitimate in order for an ascendant or sibling to recover for his death."

In *Glona*, supra, this Court was confronted with an effort by the mother of an illegitimate child to bring an action for the wrongful death of that child. Appellant submits that the same reasoning used by the Court to allow the mother in that case to bring an action for the

wrongful death of her child applies to the Appellant in the present case. This Court concluded:

> "Yet we see no possible rational basis for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death. A law which creates an open season on illegitimates in the area of automobile accidents gives a windfall to tortfeasors. But it hardly has a causal connection with the 'sin,' which is, we are told, the historic reason for the creation of the disability. To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses." (Page 74)

Appellant submits that *Glona*, supra, stands for the proposition that parents of illegitimate children may not be treated differently from parents of legitimate children consistent with the Equal Protection and Due Process Clauses of the United States Constitution.

This Court has stricken classification after classification based on illegitimacy. In *Levy v. Louisiana*, 391 U.S. 63 (1968), the Supreme Court awarded to illegitimate children the right to sue for the wrongful death of their mother. In *Trimble v. Gordon*,

97 S.Ct. 1459 (1977), this Court upheld an Equal Protection challenge to the Illinois Probate Act which allowed illegitimate children the right to inherit by intestate succession from their mothers but denied them the right of inheritance from their fathers. In *Stanley v. Illinois*, 405 U.S. 645 (1972), this Court ruled that the father of an illegitimate child has a protectable interest in his children. In *Gomez v. Perez*, 409 U.S. 535 (1973), the Supreme Court ruled that the father of an illegitimate child can be held responsible for the support of that child. In short, we have reached a point where an illegitimate child may recover for the wrongful death of its mother *(Levy)*; a mother may recover for the wrongful death of its illegitimate child *(Glona)*; an illegitimate child cannot be denied the right of inheritance from its father by intestate succession *(Trimble)*; the father of an illegitimate child can be held primarily responsible for its support (*Gomez* and *Ga. Code Ann.* §74-202); and the father of an illegitimate child is deemed to have protectable interests in his children *(Stanley)*. Each of these decisions was made on Equal Protection grounds. Appellant respectfully submits that the collective effect of these decisions demands a finding that the Georgia Wrongful Death Statute also violates the Equal Protection Clause of the United States Constitution. Appellant submits that the State might have concluded justifiably that there should be a difference in the right accorded children as the products of an illegitimate act, as opposed to the rights of the adults who are participants in that act. However, Appellant respectfully submits that there is no justification by which the State can assert the promotion of legitimate family relationships as a legitimate State interest and

thereby deny one party to an illegitimate act the right to recover for the wrongful death of the product of that act and yet award that right of recovery to the other participant in the same illegitimate act.

II.

WHETHER THERE ARE LEGITIMATE STATE INTERESTS WHICH JUSTIFY ALLOWING THE MOTHER OF AN ILLEGITIMATE CHILD TO SUE FOR ITS WRONGFUL DEATH AND DENYING THAT RIGHT TO THE FATHER OF SAID CHILD AND WHETHER GEORGIA CODE ANNOTATED 105-1307 PROMOTES ANY LEGITIMATE STATE INTERESTS WHICH MAY EXIST.

Note: Appellant has already thoroughly addressed this issue in that portion of this Jurisdictional Statement entitled "Why the Federal Questions Are Substantial". Appellant simply incorporates that analysis and the authority contained therein for the Court's consideration rather than to repeat that analysis and citation of authority.

III.

WHETHER THE GEORGIA WRONGFUL DEATH STATUTE WHICH ALLOWS THE MOTHER OF AN ILLEGITIMATE CHILD TO RECOVER FOR ITS WRONGFUL DEATH BUT DENIES THAT RIGHT TO THE FATHER CONSTITUTES IMPERMISSIBLE DISCRIMINATION BASED ON SEX.

In the case of *Frontiero v. Richardson*, 411 U.S. 677 (1973), the United States Supreme Court held that

classifications based upon sex, like those based upon race, alienage or national origin, are inherently suspect and must be subjected to strict judicial scrutiny. As previously illustrated, the State of Georgia imposes the primary support obligation for illegitimate children upon the fathers of those children. In addition, in this particular case the father of the child has actually supported the child and there was the actual existence of a father/son relationship (R-23). There is absolutely no justification under the present circumstances, for allowing the mother of an illegitimate child to bring an action for its wrongful death and denying that same right to the father.

Appellant devotes brief space to this argument at this point because the contentions which would support this argument have been incorporated into Questions I and II. However Appellant insists that the Georgia Statute, as it presently exists, does establish an exclusion based on sex which cannot survive the strict scrutiny required by the United States Supreme Court when a statute of this type is challenged on equal protection grounds. See: *Frontiero v. Richardson*, supra; and *Reed v. Reed*, 404 U.S. 71 (1971).

CONCLUSION

For the foregoing reasons, Appellant respectfully submits that probable jurisdiction should be noted.

Respectfully submitted,

TISINGER, TISINGER &
VANCE
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Attorneys for Appellant,
Curtis Parham.

CERTIFICATE OF SERVICE

GEORGIA, CARROLL COUNTY

I, Robert D. Tisinger, Counsel for the Appellant in the above styled action, do hereby certify that I have served three copies of the within and foregoing JURISDICTIONAL STATEMENT/ON APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA, upon:

A. Montague Miller, Esq.
Thomas W. Tucker, Esq.
Burnside, Dye, Miller & Bowen
Attorneys at Law
Post Office Box 2426
Augusta, GA 30903

[Attorneys for the Appellee, Ellis Franklin Hughes]

Joseph N. Anderson, Esq.
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[Attorneys for Estelle A. Moreen, Administratrix of the Estate of Lemuel Moreen Parham, Deceased Minor Child]

The above listed parties are all parties which the *Rules* of the U. S. Supreme Court require service, in compliance with Rule 33 of the *Rules of the United States Supreme Court* by depositing three true and correct copies of the same in the U. S. Mail, postage prepaid and properly addressed.

This the ____ day of June, 1978.

TISINGER, TISINGER &
VANCE
A PROFESSIONAL
CORPORATION

Rob't D. Tisinger

Attorneys for Appellant,
Curtis Parham.

APPENDIX A

308

In the Supreme Court of Georgia.

Decided: APR. 14, 1978

33071. HUGHES v. PARHAM

NICHOLS, Chief Justice.

This case draws into question the constitutionality of Ga. Code Ann. § 105-1307 (Ga. L. 1887, pp. 43-45; 1952, p. 54) which provides as follows: "A mother, or, if no mother, a father, may recover for the homicide of a child, minor or sui juris, unless said child shall leave a wife, husband or child. The mother or father shall be entitled to recover the full value of the life of such child. *In suits by the mother the illegitimacy of the child shall be no bar to a recovery.* (Emphasis supplied.) The 1952 amendment inserted the last sentence relating to illegitimate children.

Upon the death of the illegitimate child, the natural father and the maternal grandmother, in her capacity as administratrix of the estate of the deceased child, brought separate wrongful death actions against the appellant. The appellant moved for summary judgment against the natural father, contending that there was no legal theory upon which the natural father could recover.

In denying the appellant's motion for summary judgment, the trial court found that Curtis Parham, the appellee, was the natural father of the deceased child; that the natural mother of the deceased child had been killed in the automobile collision that took the life of the child; that the child had been born out of wedlock to Curtis Parham, the appellee, and the deceased mother; and that although the appellee never had married the deceased mother, he had executed the child's birth certificate acknowledging paternity of the child, had paid the birth expenses for the child, had regularly supported the child from its birth until its death, had at all times acknowledged the child as his own, and had visited the child daily. The court further found that the Georgia wrongful death statute does not bar a wrongful death action by the mother of an illegitimate child. The trial court concluded as a matter of law that because the wrongful death statute allows a mother to maintain an action for the wrongful death of her illegitimate child but denies that right to the father of an illegitimate child, the statute violates the equal protection and due process clauses of the United States Constitution.

While the trial court's order cited no authority in support of its conclusion that the wrongful death statute is unconstitutional, we assume that it was persuaded by appellee's arguments that the United States Supreme Court's decisions outlawing arbitrary legislative classifications based upon illegitimacy mandated the result. Although a superficial consideration of the policies enunciated in those cases might lead one to the conclusion that the trial court has not erred, a close and detailed examination of the constitutional analysis employed in those decisions yields a different result.

1. With limited exception, the analysis used by the Supreme Court in illegitimacy cases appears to be grounded in equal protection. See Levy v. Louisiana, 391 US 68 (88 SC 1509) (1968); Glona v. American Guarantee and Liability Insurance Company et al., 391 US 73 (88 SC 1515) (1968); Stanley v. Illinois, 405 US 645 (92 SC 1208) (1972); Webber v. Aetna Casualty and Surety Company, 406 US 164 (92 SC 1400) (1972); Gomez v. Perez, 409 US 535 (93 SC 872) (1973); New Jersey Welfare Rights Organization et al. v. Cahill, 411 US 619 (93 SC 1700) (1973); Jimenez v. Weinberger, 417 US 628 (94 SC 2496) (1974); Mathews v. Lucas, 427 US 495 (96 SC 2755) (1976); Fiallo v. Bell, ___ US ___, (97 SC 1473) (1977); Trimble v. Gordon et al., ___ US ___ (97 SC 1459) (1977); and Quilloin v. Walcott, ___ US ___, (98 SC 549) (1978).

The equal protection test focuses on whether the "ends" to be reached by the governmental classification are legitimate and whether the means employed to achieve those ends are substantially related to them, i.e., whether the exclusion of fathers of illegitimate children from the benefits of a wrongful death action is substantially related to legitimate state interests. The equal protection test is further complicated by the addition of differing standards of scrutiny depending upon the area being examined. Strict scrutiny is utilized for those areas of suspect classifications where discrimination against a particular class has traditionally existed or where paramount constitutional rights are abridged. In contradistinction to this strict scrutiny standard, a less stringent standard is used where economic or business interests are classified by the state.

The means used in the case sub judice is obviously the denial by the General Assembly of an action for wrongful death to the father of an illegitimate child. The ends, however, are not so readily discernible. The state ends might be the interests in promoting a legitimate family unit and in forestalling potential problems of proof of paternity in wrongful death actions. The promotion of this state interest might have been the result of the conclusion of the General Assembly that more often than not the father of an illegitimate child who has elected neither to marry the mother nor to legitimate the child pursuant to proper legal proceedings suffers no real loss from the child's wrongful death. Finally, the General Assembly may have decided that the state's interest in setting a standard of morality was enhanced by refusing to allow a natural father, who has refused to comport with the General Assembly's idea that society needs a legitimate family unit, to share in a statutorily given wrongful death action.

In upholding Social Security law provisions which required illegitimate dependents in certain situations to submit individualized proof of dependency against attacks based upon the equal protection clause, Justice Blackmun held that "Congress is [not] required in this realm of less than strictest scrutiny to weigh the burdens of administrative inquiry solely in terms of dollars ultimately 'spent', ignoring the relative amounts devoted to administrative rather than welfare uses . . . While the scrutiny by which their showing is to be judged is not a toothless one, the burden remains upon the appellees [plaintiffs] to demonstrate the insubstantiality of that relation."

Mathews v. Lucas, 427 U.S. at 510. Justice Blackmun's statement illustrates that the standard of scrutiny used when reviewing legislative classifications placed upon illegitimates is somewhat less than "strict scrutiny." Unfortunately, the standard enunciated by Justice Blackmun can only serve as a starting point for deciding which standard of analysis should be employed here. That standard of scrutiny is a direct result of the highest court's concern with the traditional discrimination against the illegitimate child itself. "As we said in *Lucas*, the constitutionality of this law 'depends upon the character of the discrimination and its relation to legitimate state aims. . . .' In subsequent decisions, we have expressly considered and rejected the argument that a state may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships." Trimble v. Gordon, 97 SC at 1464-1465.

Here, the classification has been placed upon the parent of an illegitimate child. We can find no Supreme Court cases which suggest that a stronger than ordinary level of scrutiny should be employed when the object of the classification is the father of an illegitimate child. We do not think that Stanley, supra, and Quilloin, supra, mandate a different conclusion. Those decisions were concerned with the forced loss of parental rights by state proceedings. The Supreme Court's concern in those cases rested not with any traditional discrimination against fathers of illegitimate children, but rather, with the potential state infringement without proper hearing upon the fundamental right of an individual to raise a family.

2. The Georgia wrongful death statute does not violate the equal protection clause of the United States Constitution. All of the four ends proffered by this court as reasons for the legislative classification are legitimate state interests. Applying a normal level of scrutiny to the legislative classification compels a finding that the means employed to attain those legitimate ends are not unconstitutional in violation of the equal protection clause. "[C]lassifications are not *per se* unconstitutional; the matter depends upon the character of the discrimination and its relation to the legitimate legislative aims." Mathews v. Lucas, 427 US at 504. "[P]resumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case by case adjudication would show, are permissible under the Fifth Amendment so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny . . . [T]he burden remains upon the [parties arguing unconstitutionality] to show the insubstantiality of that relation." Mathews v. Lucas, 427 U. S. at 509.

3. This court recognizes that Glona v. American Guarantee and Liability Insurance Company et al., supra, stands as a physical precedent for the propositions proffered by the appellee. That case, however, can be distinguished on its facts. The problems of proving maternity in Glona would be insignificant in comparison to the problems of proving paternity in the usual case. Further, the State has a legitimate interest in encouraging fathers of illegitimate children to legitimate the child by petition

or by marrying the mother. This court recognized in Quilloin, supra, that in most circumstances it is the mother, not the father, who raises and cares for the illegitimate child. Moreover, the father of the illegitimate child is usually the parent in this situation who has control over whether a legitimate family unit will exist. Thus, the state interest in promoting the family as an institution for child rearing and in setting standards of morality are arguably furthered by denying the wrongful death action to fathers of illegitimate children, although granting it to mothers.

If the facts as alleged in the father's affidavit and as found by the trial court in this case are true, he has indeed suffered and arguably should be entitled to bring a wrongful death action for the loss of his child. The remedy, however, lies with the General Assembly, not with the judiciary.

The right to bring a wrongful death action did not exist under common law. It is statutorily given. The Supreme Court of the United States has held many times that it is not unconstitutional for a state legislature to attack a perceived evil only a little at a time. In 1952 the General Assembly did this by adding the portion of Code Ann. § 105-1307 which provides that the illegitimacy of a child shall be no bar to recovery in a suit by the mother. Ga. L. 1952, p. 54. In 1979 the General Assembly could choose to amend the act to allow the father of an illegitimate child to bring a wrongful death action. The Constitution, however, does not require that this court do so.

4. The trial court also found that the wrongful death action violated the appellee's due process rights. This court concludes to the contrary.

5. For the reasons set out above, the trial court erred in finding Code Ann. § 105-1307 unconstitutional in violation of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

Judgment reversed. All the Justices concur, except Hill, J., who dissents.

APPENDIX B

IN THE SUPERIOR COURT
FOR THE COUNTY OF RICHMOND
STATE OF GEORGIA

CURTIS PARHAM,
Plaintiff

versus
Civil Action
File No. 5643-C

ELLIS FRANKLIN HUGHES,
Defendant

ORDER

The defendant, Ellis Franklin Hughes, having filed a motion for summary judgment in the case styled

above, and the same having come on for hearing on September 1st, 1977, and both parties having been represented by counsel, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1.

Curtis Parham is the natural father of Lemuel Parham, deceased, said minor child having been killed in an automobile accident on or about December 30, 1976.

2.

That the natural mother of said minor child, Cassandra Moreen, was killed in the same accident which claimed the life of the minor child, Lemuel Parham.

3.

That the deceased minor child Lemuel Parham was an illegitimate child, having been born to Curtis Parham and Cassandra Moreen, out of wedlock.

4.

That although Curtis Parham, the natural father of the child, never married Cassandra Moreen, the natural mother of said child, Curtis Parham did execute the birth certificate acknowledging paternity of the child. In addition, Curtis Parham paid the birth ex-

penses for the birth of Lemuel Parham and had regularly supported said child from its birth until its death.

5.

That Curtis Parham at all times acknowledged the child as his son and was at all times acknowledged by the child as his father and in addition to paying child support, Curtis Parham maintained charge accounts at grocery stores for food and other necessities to further insure the support of his child.

6.

That Curtis Parham visited regularly with the deceased child and in fact saw him virtually every day and had the child with him on many weekends.

7.

That following the death of the minor child and the natural mother of the minor child in the collision identified herein, Curtis Parham instituted an action in the Superior Court of Richmond County, State of Georgia, for the wrongful death of the illegitimate child Lemuel Parham, asserting his rights to recover for the wrongful death of said child.

8.

That almost simultaneously, Estelle A. Moreen, maternal grandmother of the deceased minor child, in

her capacity as Administratrix of the Estate of Lemuel Parham, filed an identical action seeking to recover for the wrongful death of the minor child.

9.

That following the institution of the two actions for wrongful death identified above, Ellis Franklin Hughes, defendant in both actions, filed this motion for summary judgement against Curtis Parham contending that the plaintiff Curtis Parham was prohibited by law from bringing a wrongful death action for the death of his illegitimate son.

10.

That the Georgia Wrongful Death Statute presently provides that illegitimacy of the deceased child is not a bar to an action for wrongful death by the mother of said child. (See: Georgia Code Annotated §105-1307).

11.

That the Georgia Legislature has placed primary responsibility for the support of illegitimate children upon the fathers of said children. (See: Georgia Code Annotated §74-202).

CONCLUSIONS OF LAW

1.

To the extent that the Georgia Wrongful Death Statute conditions the right of either parent to sue for the wrongful death of its child upon the legitimacy or il-

legitimacy of the child, that Statute constitutes a denial of equal protection and due process within the meaning of the 5th and 14th Amendments to the United States Constitution.

2.

To the extent that the Georgia Wrongful Death Statute purports to allow the mother of an illegitimate child to maintain an action for the wrongful death of that child and denies that right to the father of an illegitimate child, that Statute constitutes a denial of equal protection and due process in violation of the 5th and 14th Amendments to the United States Constitution.

3.

Where the state imposes the primary support obligation for illegitimate children upon the father of those children and where the father of an illegitimate child in fact has provided some level of support for that child and has acknowledged his paternity by execution of the birth certificate and has in every respect treated the child as his own, the State cannot constitutionally deny that father the right to maintain an action for the wrongful death of his child where the mother of said child is also deceased.

4.

The Court finds that Curtis Parham, natural father of the deceased illegitimate child Lemuel Parham, who has since the child's birth acknowledged his

paternity, provided a level of support for said child and exercised extensive visitation with said child, is the proper person to maintain an action for the wrongful death of said minor child.

Based upon the foregoing Findings of Fact and Conclusions of Law, the motion for summary judgment filed by the defendant Ellis Franklin Hughes against the plaintiff, Curtis Parham, is hereby DENIED.

This the 13th day of September, 1977.

/s/ FRANKLIN H. PIERCE
FRANKLIN H. PIERCE
Judge, Richmond Superior Court
State of Georgia

APPENDIX C

Clerk's Office, Supreme Court of Georgia

DEAR SIR: ATLANTA 4/19/78

The motion for a rehearing was denied today:
Case No. 33071, Hughes v. Parham

Hill, J., dissents.

Yours very truly,

MRS. JOLINE B. WILLIAMS,
Clerk

APPENDIX D

IN THE SUPREME COURT
FOR THE STATE OF GEORGIA

ELLIS FRANKLIN HUGHES,
Appellant

versus

Civil Action
File No. 33071

CURTIS PARHAM,
Appellee.

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

Notice is hereby given that Curtis Parham, the Appellee above named, hereby appeals to the Supreme Court of the United States from the Final Order of the Supreme Court for the State of Georgia upholding the validity of a Georgia Statute which had been found by the trial court to be repugnant to the Constitution of the United States, to-wit:

> The Supreme Court of the State of Georgia reversed a decision of the Superior Court of Richmond County, Georgia, which had sustained attacks on the Georgia Wrongful Death Statute made pursuant to the Equal Protection and Due Process Clauses of the United States Constitution and finding that Statute in violation of the Due Process and Equal Protection Clauses of the United States Constitution to

> the extent that it (a) conditioned the right of either parent to sue for the wrongful death of its child upon the legitimacy or illegitimacy of the child, (b) purports to allow the mother of an illegitimate child to maintain an action for the wrongful death of that child and denies that right to the father of an illegitimate child, (c) imposes the primary support obligation for illegitimate children upon the father of those children and then where the father of an illegitimate child has, in fact, provided a level of support for that child, has acknowledged its paternity by execution of the birth certificate and has, in every respect, treated the child as his own, denies that father the right to maintain an action for the wrongful death of his child where the mother of said child is also deceased.

The Supreme Court for the State of Georgia reversed the Order of the Superior Court of Richmond County, Georgia, upholding the validity of the Georgia Wrongful Death Statute; which the trial court had held to be repugnant to the Constitution of the United States.

The decision of the Supreme Court for the State of Georgia, which is the subject of this Appeal, was entered on the 4th day of April, 1978. An Order denying Motion for Rehearing was entered on April 19, 1978.

This Appeal is taken pursuant to *28 United States Code 1257 (2)*.

Respectfully submitted,

TISINGER, TISINGER & VANCE
A PROFESSIONAL CORPORATION

/s/ ROBERT D. TISINGER
Rob't D. Tisinger

/s/ THOMAS E. GREER
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CERTIFICATE OF SERVICE

I, Thomas E. Greer, Counsel for the Appellee in the above styled action, do hereby certify that I have served a copy of the within and foregoing NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT upon:

A. Montague Miller, Esq.
Thomas W. Tucker, Esq.
Burnside, Dye, Miller & Bowen
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Post Office Box 2426
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(Attorneys for the Appellant,
Ellis Franklin Hughes)

Joseph N. Anderson, Esq.
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(Attorneys for Estelle A. Moreen,
Administratrix of the Estate of
Lemuel Moreen Parham, Deceased
Minor Child)

The above listed parties are all parties which the *Rules* of the United States Supreme Court require service in compliance with *Rule 33* of the *Rules* of the United States Supreme Court by depositing a true and correct copy of the same in the United States Mail,

properly addressed, and with sufficient postage affixed thereon.

This the 26th day of April, 1978.

/s/ THOMAS E. GREER
Thomas E. Greer
(Attorney for the
Appellee, Curtis Parham)

APPENDIX E

In the Supreme Court of Georgia

33071. HUGHES v. PARHAM

HILL, Justice, dissenting.

The majority falls to explain how the state's objective of promoting a legitimate family unit is furthered by denying the father of an illegitimate child an action for that child's wrongful death. The illegitimate child is already dead by the time the means chosen by the state comes into operation. The denial of a claim for a child's wrongful death does not promote the family as an institution for rearing that child in a timely or rational manner regardless of the level of scrutiny employed. The sanction adopted by the state is not suited and comes too late to motivate a father to provide care for his illegitimate child. It treats the father of an illegitimate child different from the

mother of that same child and thus constitutes a denial of equal protection.

The majority seek to distinguish Glona v. American Guarantee and Liability Ins. Co., supra, based on the difference in proving paternity vs. maternity, a ground which was expressly rejected in Trimble v. Gordon, supra, where the Court stated that although a state might adopt a more demanding standard of proof for fathers of illegitimate children than for mothers, the extreme means of complete exclusion of recovery was not permissible. Because I cannot accept at face value the tortfeasor's proffered state rationale or a distinction of Glona already rejected by the U. S. Supreme Court, I must respectfully dissent.

Supreme Court, U. S.
FILED
AUG 8 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-3

CURTIS PARHAM,

Appellant,

versus

ELLIS FRANKLIN HUGHES,

Appellee.

Appeal from the Supreme Court
of the State of Georgia

MOTION OF APPELLEE TO DISMISS APPEAL

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-3

CURTIS PARHAM,
Appellant,

versus

ELLIS FRANKLIN HUGHES,
Appellee.

Appeal from the Supreme Court
of the State of Georgia

MOTION OF APPELLEE TO DISMISS APPEAL

Pursuant to Rule 16(b) of the Rules of the Supreme Court of the United States, Appellee, within 30 days from the receipt of Appellant's jurisdictional statement, respectfully moves that the appeal herein be dismissed on the ground that said appeal does not present a substantial Federal question.

SUPPLEMENT TO APPELLANT'S STATEMENT OF THE CASE

Appellant contends that he is the proper party to maintain an action for the alleged wrongful death of his illegitimate child. However, in his statement of the case, Appellant did not point out to this Court that Estelle A. Moreen, as administratrix of the estate of Lemuel Parham, the deceased illegitimate child of Appellant, has also brought an action against Appellee for the alleged wrongful death of said Lemuel Parham in the Superior Court of Richmond County, State of Georgia, Civil Action File No. 5710-C (R. 15-18). In said complaint filed by Estelle A. Moreen, as administratrix of the estate of Lemuel Parham (R. 15-17), said Estelle A. Moreen alleged that she was the proper party to maintain an action for the alleged wrongful death of said Lemuel Parham. In this regard, *Georgia Code Annotated* 105-1309 provides as follows:

> In cases where there is no person entitled to sue under the foregoing provisions of this Chapter [the Georgia Wrongful Death Chapter], the administrator or executor of the decedent may sue for and recover and hold the amount recovered for the benefit of the next of kin. In any such case, the amount of the recovery shall be the full value of the life of the decedent.

As can be seen, the Georgia Legislature has provided for a method of recovery in cases such as the one at bar without having to open the Pandora's box of proving paternity in the death action, which would ultimately result if Appellant's position were upheld.

I.
THE FEDERAL QUESTIONS ARE NOT SUBSTANTIAL

Appellee respectfully submits that the exclusion of fathers of illegitimate children from the benefits of an alleged wrongful death action is substantially related to the legitimate state interests set out in the Georgia Supreme Court decision; that the Georgia Wrongful Death Statute does not violate the equal protection clause or due process clause of the United States Constitution; and that the Georgia Legislature's policy of excluding the father of an illegitimate child from bringing an action for the alleged wrongful death of said child is not an arbitrary legislative classification which should be struck down. As such, no substantial Federal questions are presented for review by this Court.

In *Quilloin v. Walcott*, 98 S. Ct. 549, 553 (1978), this Court stated, in discussing the opinion of the Georgia Supreme Court at 238 Ga. 230, that:

> The majority [of the Georgia Supreme Court] relied generally on the strong state policy of rearing children in a family setting, a policy which in the court's view might be thwarted if unwed fathers were required to consent to adoptions.

This same strong state policy is a legitimate state interest to be recognized and protected in the case at bar as so held by the Georgia Supreme Court.

Although Appellant argues that the problem of proving paternity is not a legitimate state interest so as to justify denying the natural father of an illegitimate child a cause of action for the death of said child, Appellee respectfully disagrees. By recognizing the right of the mother of an illegitimate child to bring a suit for the wrongful death of the child, the Georgia Legislature is recognizing that an alleged negligent tortfeasor should not be allowed to profit from his alleged wrongdoing. In not one of the cases cited by the Appellant has the United States Supreme Court ruled that the natural father of an illegitimate child has a right of action for the death of the child. The results obtained by this Court in *Glona v. American Guaranty and Liability Insurance Company*, 391 U.S. 73 (1968) and *Levy v. Louisiana*, 391 U.S. 63 (1968) have been awarded by statute in Georgia as the Georgia Wrongful Death Statutes allow an illegitimate child to bring a suit for the death of his mother and the mother of an illegitimate child to bring an action for the death of said child.

Outside of the legitimate state interests recognized by the Georgia Supreme Court of promoting the rearing of children in a marital relationship; of removing problems of proof of paternity in wrongful death actions; of encouraging fathers of illegitimate children to legitimate the child by petition (*Georgia Code Annotated* § 74-103) or by marrying the mother (*Georgia Code Annotated* § 74-101), Appellee respectfully submits that another legitimate state interest to be served in denying the natural father of an illegitimate child, regardless of the amount of support provided to the child, the right to sue for the alleged wrongful death of

the child, is the very legitimate state interest of encouraging the settlement of disputes between parties and avoiding litigation.

In *Williams v. First National Bank of Pauls Valley*, 216 U.S. 582, 595 (1910), this Court stated that "compromises of disputed claims are favored by the courts (*Hennessy v. Bacon*, 137 U.S. 78 . . .)." If this Court were to rule, as requested by Appellant, that the natural father of an illegitimate child has a right of action for the death of the child, when there is no natural mother in life, no defendant could ever settle a case with certainty. Although in the case at bar, the natural father was known, this would obviously not be true in the vast majority of cases. A defendant would be faced with the distinct possibility of paying twice or going to the problem and expense of attempting to locate a natural father which, after a period of time, would be practically impossible. Additionally, a holding that the natural father could bring an action for the death of an illegitimate child could cause a deluge of spurious and nuisance suits which a defendant would be compelled to defend and attempt to prove lack of paternity. As the Georgia Legislature has provided in *Georgia Code Annotated* § 105-1309 for a right of action in the estate of a deceased person for the wrongful death of such person in a situation such as the instant one, would it not be better for the issue of paternity and the natural father's right to recover, if any, to be decided in the Probate Court in the contest involving the disbursement of the assets of the estate of the minor child?

As they now stand, the Georgia Wrongful Death Statutes provide a very orderly scheme for the prosecution of suits involving the death of a party. To rule in favor of the Appellant would interject confusion and chaos into such system. This in itself, Appellee respectfully submits, is a legitimate state interest to be served in affirming the decision of the Georgia Supreme Court and dismissing the appeal taken herein.

II.
CONCLUSION

As no substantial federal questions are presented by Appellant's contentions, Appellee respectfully submits that probable jurisdiction should not be noted; and Appellee's motion to dismiss the appeal should be sustained.

Respectfully submitted,

DYE, MILLER, BOWEN
& TUCKER

_____

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CERTIFICATE OF SERVICE

I, A. Montague Miller, Counsel for the Appellee in the above styled action, do hereby certify that I have served three copies of the within and foregoing MOTION OF APPELLEE TO DISMISS APPEAL upon:

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The above listed parties are all parties which the Rules of the United States Supreme Court require service in compliance with Rule 33 of the Rules of the United States Supreme Court by depositing three true and correct copies of the same in the United States Mail, properly addressed, and with sufficient postage affixed thereon.

This ____ day of August, 1978.

A. MONTAGUE MILLER

ATTORNEY FOR ELLIS
FRANKLIN HUGHES

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-3

CURTIS PARHAM,

Appellant

v.

ELLIS FRANKLIN HUGHES,

Appellee

On Appeal from the Supreme Court of the State of Georgia

BRIEF OF APPELLANT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

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OCTOBER TERM, 1978

No. 78-3

CURTIS PARHAM,
Appellant

v.

ELLIS FRANKLIN HUGHES,
Appellee

On Appeal from the Supreme Court of the State of Georgia

BRIEF OF APPELLANT

OPINIONS BELOW

The Opinion of the Supreme Court of Georgia is reported at *241 Ga. 198*. The unofficial citation is *243 S.E. 2nd 867*. A copy of the Opinion of the Supreme Court of Georgia may be found in the Jurisdictional Statement at Page 1a.

JURISDICTION

Jurisdiction in this Court is invoked pursuant to *28 United States Code 1257(2)* since there is drawn in ques-

tion the validity of a state statute contended to be repugnant to the United States Constitution and the decision of the Georgia Supreme Court was in favor of the validity of that statute. The trial court below concluded that the statute in question, Georgia Wrongful Death Statute, *Georgia Code Annotated* § *105-1307*, was repugnant to the Due Process and Equal Protection Clauses of the *5th* and *14th Amendments* to the United States Constitution. The trial court concluded that the statute violated the Due Process and Equal Protection Clauses of the United States Constitution by allowing the mother of an illegitimate child to sue for the wrongful death of that child while denying that right to the father of the illegitimate child. A copy of the trial court's Opinion may be found in the Appendix at Page 3.

The Georgia Supreme Court reversed the Decision of the trial court, upholding the validity of the Georgia Wrongful Death Statute and concluded that it did not constitute a denial of equal protection or violation of due process by allowing the mother of an illegitimate child to sue for its wrongful death and denying that right to the father even in cases like the present one, where the natural mother was deceased and the natural father had supported the child from its birth until its death, acknowledged the child by the execution of its birth certificate and maintained constant contact with the child through almost daily visitation from its birth until its death.

The Opinion of the Georgia Supreme Court from which this Appeal is taken is dated April 4, 1978, and was entered on the 4th day of April, 1978. A Motion for Rehearing in the matter was timely filed on April 12, 1978, and the Motion for Rehearing was denied on April 19, 1978. A copy of the Denial of the Motion for Rehearing may be found in the Jurisdictional Statement at Page 13a.

A Notice of Appeal to the United States Supreme Court was timely filed on the 28th day of April, 1978, in the Supreme Court of Georgia. A copy of the Notice of Appeal to the United States Supreme Court may be found in the Jurisdictional Statement at Page 14a.

This Court noted probable jurisdiction on October 2, 1978.

As mentioned previously, the statutory provision conferring jurisdiction on this Court is *28 United States Code 1257(2)* since the case involves the question of the validity of a state statute challenged as being repugnant to the Constitution of the United States and the Decision of the Georgia Supreme Court was in favor of the validity of this statute.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A.

1887 Georgia Laws, pp. 43-45; *1952 Georgia Laws*, pp. 54 (*Georgia Code Annotated* § 105-1307):

"§ *105-1307 Homicide of Child.*

A mother, or, if no mother, a father may recover for the homicide of a child, minor or sui juris, unless said child shall leave a wife, husband or child. The mother or father shall be entitled to recover the full value of the lief of such child. *In suits by the mother the illegitimacy of the child shall be no bar to a recovery.*"

(Emphasis Added)

B.

1972 Georgia Laws, pp. 494-495 (*Georgia Code Annotated* § 74-202):

"§ *74-202 Father's Obligation to Support.*

The father of an illegitimate child shall be bound to maintain him until said child reaches the age of

eighteen, marries or becomes self-supporting, whichever occurs first. This obligation shall be good consideration to support a contract by him. He may voluntarily discharge this duty; if he shall fail or refuse to do it, the law will compel him: provided however, that the Superior Court shall have the power, upon petition of the father to require the mother of an illegitimate child to contribute to such support upon a determination that the financial circumstances of both the father and the mother are such that justice and equity require the mother to share in or have responsibility for such support."

C.

14th Amendment to the United States Constitution

"*14th Amendment to the United States Constitution —Citizenship.*

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

D.

28 United States Code 1257(2)

"*28 United States Code 1257(2) State Courts; Appeals; Certiorari.*

Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows:

(2) By Appeal where is drawn in question the validity of a statute of any state on the ground of

its being repugnant to the Constitution, Treaties or Laws of the United States and the decision is in favor of its validity."

QUESTIONS PRESENTED

I.

WHETHER GEORGIA CODE ANNOTATED § 105-1307 VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE 5TH AND 14TH AMENDMENTS BY ALLOWING THE MOTHER OF AN ILLEGITIMATE CHILD TO RECOVER FOR ITS WRONGFUL DEATH BUT DENYING THAT RIGHT TO THE FATHER OF AN ILLEGITIMATE CHILD.

(A) WHETHER THERE ARE LEGITIMATE STATE INTERESTS WHICH JUSTIFY ALLOWING THE MOTHER OF AN ILLEGITIMATE CHILD TO SUE FOR ITS WRONGFUL DEATH AND DENYING THAT RIGHT TO THE FATHER OF SAID CHILD.

(B) WHETHER GEORGIA CODE ANNOTATED § 105-1307 PROMOTES OR IS RATIONALLY RELATED TO ANY LEGITIMATE STATE INTEREST WHICH MIGHT JUSTIFY ALLOWING THE MOTHER OF AN ILLEGITIMATE CHILD TO SUE FOR ITS WRONGFUL DEATH AND DENYING THAT RIGHT TO THE FATHER OF SAID CHILD.

II.

WHETHER THE GEORGIA WRONGFUL DEATH STATUTE WHICH ALLOWS THE MOTHER OF AN ILLEGITIMATE CHILD TO RECOVER FOR ITS WRONGFUL DEATH BUT DENIES THAT RIGHT TO THE FATHER CONSTITUTES IMPERMISSIBLE DISCRIMINATION BASED ON SEX.

STATEMENT OF THE CASE

(A) Statement of the Facts

The Appellant herein, Curtis Parham, was the natural father of Lemuel Parham, a minor child, who was killed in an automobile accident (R-25). The child's natural mother, Cassandra Moreen, was killed in the same accident (R-25). While Appellant and his child's natural mother were never married, the Appellant signed the child's birth certificate acknowledging his paternity (R-24), and the child utilized Appellant's name (Parham), as opposed to the natural mother's name (Moreen) (R-25).

In addition, it was established without contradiction and adopted as findings of fact by the trial court that the Appellant paid the birth expenses for his minor child and supported his minor child from its birth until its death (R-23; A-3). It was established without contradiction and made a part of the trial court's Order, that the Appellant had, at all times, acknowledged the child as his own and was at all times acknowledged by the child as its father; and in addition to paying child support the Appellant maintained and paid charge accounts at grocery stores for food and other necessities to insure the support of this child and further that the Appellant visited regularly with the child and in fact saw him every day and every weekend and had the child with him for many complete weekends (R-23; A-3).

Following the death of his minor child in an automobile accident which also claimed the life of the child's mother, Appellant filed this original action seeking to recover for the wrongful death of his minor child in the Superior Court of Richmond County, Georgia, on February 7, 1977 (R-3).

The original complaint named the Appellee herein as defendant and charged said Appellee with negligence in

the death of the minor child and sought recovery for that death (R-3 through 6). An explanation of the proceedings which account for the present status of the case is contained below.

(B) The Proceedings Below

As stated above, the Appellant filed this original complaint seeking to recover for the wrongful death of his child on February 7, 1977 (R-3). The Appellee herein filed responsive pleadings to the complaint (R-8 and 9). The maternal grandmother, acting as Administratrix of the Estate of the deceased child, then filed a complaint in the Superior Court of Richmond County, Georgia, seeking also to recover for the wrongful death of the child and naming the Appellee herein as defendant (R-15).

The Appellee herein then filed a Motion for Summary Judgment Against the Appellant, Curtis Parham, contending that *Georgia Code Annotated* § 105-1307 prevented the Appellant from recovering for the wrongful death of his illegitimate child. Georgia Code Annotated § 105-1307 (*1887 Georgia Laws*, 43, 45; *1952 Georgia Laws*, 54) provides:

> "A mother, or if no mother, a father, may recover for the homicide of a child, minor or sui juris, unless said child shall leave a wife, husband or child. The mother or father shall be entitled to recover the full value of the life of such child. In suits by the mother, the illegitimacy of the child shall be no bar to a recovery."

Appellee relied on this statutory provision which allows the mother of an illegitimate child to sue for its wrongful death but denies that right to the father (R-14).

The trial court, Superior Court of Richmond County, Georgia, denied the Appellee's Motion for Summary Judg-

ment (R-25; A-3). In so doing, the court concluded that the Appellant herein, the natural father of the child, was the proper party to maintain an action for the alleged wrongful death of his minor child and found *Georgia Code Annotated* § 105-1307 to be in violation of the Due Process and Equal Protection Clauses of the United States Constitution. In its Order the court made findings of fact and conclusions of law. The Order is set forth in its entirety in the Appendix at Page 3. The court found the Georgia Wrongful Death Statute deficient in three regards. The court concluded:

1.

"To the extent that the Georgia Wrongful Death Statute conditions the right of either parent to sue for the wrongful death of its child upon the legitimacy or illegitimacy of the child, that Statute constitutes a denial of Equal Protection and Due Process within the meaning of the *5th* and *14th Amendments* to the United States Constitution."

2.

"To the extent that the Georgia Wrongful Death Statute purports to allow the mother of an illegitimate child to maintain an action for the wrongful death of that child and denies that right to the father of an illegitimate child, that Statute constitutes a denial of Equal Protection and Due Process in violation of the *5th* and *14th Amendments* to the United States Constitution."

3.

"Where the state imposes the primary support obligation for illegitimate children upon the father of those children and where the father of an illegitimate child in fact has provided some level of support for that child and has acknowledged his paternity by execution of the birth certificate and has in every respect treated the child as his own, the State cannot

constitutionally deny that father the right to maintain an action for the wrongful death of his child where the mother of said child is also deceased."

The court concluded in its findings of fact that although the Appellant, as the natural father of the deceased minor child, had never married the natural mother, that Appellant had executed the birth certificate acknowledging his paternity of the child and had paid the birth expenses for the birth of said child and had regularly supported the child from its birth until its death (A-3). The court further found that the Appellant had, at all times, acknowledged the child as his son and was at all times acknowledged by the child as his father and that in addition to paying child support, the Appellant had maintained charge accounts at grocery stores for food and other necessities to further insure the support of this child and had visited regularly with the deceased minor child and, in fact, saw him virtually every day (A-3).

Following the Order of the trial court finding the Georgia Wrongful Death Statute in violation of the Due Process and Equal Protection Clauses of the United States Constitution, the Appellee herein was granted a Certificate of Immediate Review by the trial court (R-30). The Georgia Supreme Court granted the Appellee's Application for Interlocutory Appeal on October 13, 1977 (R-1). On April 4, 1978, the Georgia Supreme Court reversed the Decision of the trial court, concluding that the Georgia Wrongful Death Statute does not violate the Due Process or Equal Protection Clauses of the United States Constitution (Jurisdictional Statement —Page 1a). The Supreme Court failed to address the issue of sex-based discrimination although that issue was raised and argued in Appellant's Brief.

Following this Decision by the Georgia Supreme Court the Appellant's Motion for Rehearing was denied on

April 19, 1978 (See Jurisdictional Statement—Page 13a). On the 28th day of April, 1978, Appellant herein timely filed a Notice of Appeal to the United States Supreme Court (A-11). The Appeal was filed pursuant to *28 United States Code 1257(2)* since the case draws into question the validity of a state statute on the grounds that it is repugnant to the United States Constitution and the Decision of the Georgia Supreme Court was in favor of the validity and constitutionality of that statute (Jurisdictional Statement—Page 1a).

SUMMARY OF ARGUMENT

I.

The present Georgia Wrongful Death Statute as embodied at *Georgia Code Annotated* § 105-1307 allows the mother of an illegitimate child to recover for the wrongful death of that child but denies that right to the father. The Supreme Court of Georgia reversed the decision by the trial court and ruled that the Georgia Wrongful Death Statute was not repugnant to the Equal Protection and Due Process Clauses of the United States Constitution. In reversing the trial court, the Georgia Supreme Court asserted four allegedly valid state interests promoted by the classification in issue.

Two of those asserted state interests have been considered at length by this Court and rejected. The first centers around problems of proof of paternity. This Court has concluded on numerous occasions that while problems centering around proof of paternity might justify strict standards of proof, they can very seldom if ever justify the total statutory exclusion of a class of illegitimates. Moreover, paternity was conclusively established in the present case as demonstrated by the Record which clearly demonstrates the fallacy of irrebuttable presumptions and the total exclusion of all members of a class in situations like the present one.

Secondly, the Georgia Supreme Court contended that the present classification was justified since the Appellant could have avoided any unconstitutional impact of the classification by legitimating the child or marrying the mother. In the 1977 case of *Trimble* v. *Gordon*, 430 U.S. 762 and the 1972 case of *Stanley* v. *Illinois*, 405 U.S. 645, this Court routinely rejected these contentions. The Court made it abundantly clear that the question to be decided is whether the classification is consistent with the Equal Protection Clause and not whether any unconstitutional impact of the classification may be avoided by alternative action.

The remaining asserted state interests by the Georgia Supreme Court cannot possibly be promoted by the classification at issue in the present case and there was no effort by the Georgia Supreme Court to demonstrate any means by which these classifications could be construed to be promoted by the present classification. The remaining interests asserted by the Georgia Supreme Court center around the state's interest in encouraging legitimation, insuring high standards of morality and avoiding spurious claims. The Georgia Supreme Court totally fails to demonstrate how these admittedly valid state interests are promoted by a classification which punishes one party to an illegitimate act and rewards the other party to that illegitimate act. In short, the Court totally fails to demonstrate any relationship whatsoever between the asserted goal and the ability of the classification to promote that goal. These contentions are supported in the Argument and Citation portion of this Brief by reference to this Court's decisions in *Glona* v. *American Guaranty & Liability Insurance Company*, 391 U.S. 73 (1968); *Stanley* v. *Illinois*, supra; *Trimble* v. *Gordon*, supra; and *Weber* v. *Aetna Casualty & Surety Company*, 406 U.S. 164 (1972).

This Court's recent decision in *Quilloin* v. *Walcott*, United States Supreme Court Case No. 76-6372, Decided

January 10, 1978, is readily distinguishable from the present case. In that case the Court simply concluded that a state may have a legitimate interest in adopting different standards in the adoptive process for fathers of illegitimate children and divorced fathers. The Court also partially based it's decision upon the fact that the father of the illegitimate child in *Quilloin*, supra, had never maintained any meaningful relationship with the child whatsoever. In the present case, the classification does not distinguish between parents of illegitimate children and parents of legitimate children. But rather, it distinguishes between two parties to an illegitimate act, rewarding one of those parties and punishing the other. Moreover, the Record conclusively demonstrates in this case that the Appellant in the present case maintained an extremely meaningful relationship with his child by execution of the birth certificate, the payment of the birth expenses, the payment of support from birth until death, the maintenance of charge accounts for the care and support of the child and daily visitation (A-3).

The Appellee asserts two arguments in his Motion to Dismiss, neither of which is pertinent to the issue before the Court. First, the Appellee contends that the Georgia Wrongful Death Statute is not constitutionally inappropriate since it provides an alternative scheme of recovery even though that scheme of recovery excludes the natural father of the child. Appellant submits that the issue before this Court is not whether Georgia has provided an alternative scheme of recovery, but rather whether that alternative scheme of recovery comports with the mandates of the Due Process and Equal Protection Clauses of the United States Constitution.

Secondly, Appellee contends that a decision in favor of the Appellant would subject individuals in the position of the Appellee to the prospect of double recovery and put them to the difficulty of having to locate the

fathers of illegitimate children. Appellant demonstrates in this Brief that this Court has provided for recovery by illegitimates and thereby disrupting other State schemes of recovery without creating the prospect of double recovery, since implicit in this Court's ruling in favor of the Appellant would be a ruling that he is the party entitled to recover to the exclusion of all other parties. Moreover, Appellant demonstrates in his Brief the fallacy of Appellee's argument that he and other similarly situated individuals would be put to the difficulty of locating fathers of illegitimate children. The Appellee's argument assumes that there is no middle ground, that the state must either allow all fathers of illegitimate children to recover or deny that right to all fathers of illegitimate children. Appellant demonstrates in his Brief how the State of Georgia has attained a middle ground between these extremes in the area of adoption. In short, the State of Georgia has not carefully considered the alternatives and could certainly adopt a scheme of recovery demanding strict requirements of the proof without unduly burdening defendants similarly situated to the Appellee in the present case.

II.

Appellant further contends that the present classification constitutes impermissible discrimination based on sex in violation of the Due Process and Equal Protection Clauses of the United States Constitution. The present classification cannot survive the level of scrutiny imposed by the Supreme Court of the United States in the area of gender-based classifications. Since *Reed* v. *Reed*, 404 U.S. 71 (1971), this Court requires that statutory classifications distinguishing between males and females must serve important government objectives and must be substantially related to the achievement of those objectives. The Court has further emphasized that gender-based legislative classification premised on overbroad

generalization concerning the behavior and proclivities of the two sexes cannot be tolerated under the Constitution. (*Stanley* v. *Illinois*, 405 U.S. 645 (1972); and *Stanton* v. *Stanton*, 421 U.S. 7 (1975).

The present decision by the Georgia Supreme Court is replete with the kind of overbroad generalizations and assumptions about "the way men and women are" which this Court has uniformly rejected. The Georgia Supreme Court places the entire burden for the legitimation of children, the incentive to promote a marriage and legitimate family unit upon the father. This burden is not demonstrated or warranted by virtue of any statistics, it is merely asserted.

The Court assumes without proving that all fathers who fail to legitimate the child by petition or by marrying the mother suffer no real loss when their children die (See Jurisdictional Statement—Page 7a).

Appellant further demonstrates in the Argument and Citation portion of this Brief that the generalized objectives asserted by the Georgia Supreme Court cannot possibly be promoted by a classification excluding one party to an illegitimate act from recovery and awarding the right of recovery to the other party to that illegitimate act.

ARGUMENT AND CITATION OF AUTHORITY

I.

GEORGIA CODE ANNOTATED § 105-1307 VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION BY ALLOWING THE MOTHER OF AN ILLEGITIMATE CHILD TO RECOVER FOR THAT CHILD'S WRONGFUL DEATH BUT DENYING THAT RIGHT TO THE FATHER OF THE CHILD.

Appellant submits that the State of Georgia cannot, consistent with the Due Process and Equal Protection Clauses of the United States Constitution, allow the natural mother of an illegitimate child to recover for the wrongful death of that child and deny that right to the father, especially where the natural mother is deceased and the natural father has acknowledged his paternity by executing the birth certificate, paid the birth expenses on the child, supported the child from its birth until its death, maintained charge accounts for the additional support of the child and visited with the child on virtually a daily basis from its birth until its death (R-23 through 27). The trial court agreed with Appellant (A-3). The Georgia Supreme Court reversed asserting four valid state interests allegedly promoted by this classification (Jurisdictional Statement—Page 1a).

In the area of classifications based on illegitimacy, this Court has insisted that the classification bear a rational relationship to a legitimate state purpose. (*Trimble* v. *Gordon*, 430 U.S. 762 (1977)). In *Trimble*, supra, this Court stated:

> "Despite the conclusion that classifications based on illegitimacy fall in a realm of less than strictest scrutiny, *Lucas* also establishes that the scrutiny is not a toothless one, a proposition clearly demonstrated by our previous decisions in this area."

The Georgia Supreme Court correctly stated the test in its Opinion when it concluded:

> "The equal protection test focuses on whether the ends to be reached by the governmental classification are legitimate and whether the means employed to achieve those ends are substantially related to them, i.e. whether the exclusion of fathers of illegitimate children from the benefits of a wrongful death action is substantially related to legitimate state interests." (See Jurisdictional Statement—Page 3a)

This portion of Appellant's Brief will address what the Georgia Supreme Court considered to be legitimate state interests promoted by this classification. In addition, this portion of Appellant's Brief will distinguish this Court's Decision in *Quilloin* v. *Walcott*, United States Supreme Court, Case No. 76-6372, Decided January 10, 1978, and will analyze certain arguments advanced by the Appellee.

(A) There Are No Legitimate State Interests Which Justify Allowing The Mother Of An Illegitimate Child To Sue For That Child's Wrongful Death And Denying That Right To The Father Of The Child.

As previously stated, the Georgia Supreme Court asserted four allegedly valid state interest promoted by this classification. This Court has previously declared that two of these asserted state interests are not sufficient to warrant total statutory exclusion of a class of illegitimates. Appellant will address these two interests asserted by the Georgia Supreme Court initially. The remaining two allegedly valid state interests asserted by the State Supreme Court have been rejected in Decisions by this Court as not being rationally related to and not promoting the interests identified. These latter asserted interests will be discussed secondly.

Initially the Georgia Supreme Court asserts that the State has a legitimate interest in forestalling potential

problems of proof of paternity in wrongful death actions. (See the Georgia Supreme Court Opinion, Jurisdictional Statement—Page 1a, 3a and 4a). With regard to problems of proof of paternity in illegitimacy cases, this Court has stated in *Gomez* v. *Perez*, 409 U.S. 535 (1973):

> "We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an inpenatrable barrier that works to shield otherwise invidious discrimination." (Page 539)

Likewise, in the 1977 case of *Trimble* v. *Gordon*, 402 U.S. 762, this Court stated:

> "Difficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate."

Likewise Appellant submits that difficulties and problems of proving paternity do not justify the total denial of the legal and biological relationship between a father and his illegitimate child, especially where that relationship existed in fact as documented in the present matter. In discussing many of the decisions of the United States Supreme Court, the Fifth Circuit Court of Appeals in the case of *Beaty* v. *Weinberger*, 478 F.2nd 300 (5th Cir. 1973), concluded:

> "What is significant about these cases is the Court's implicit, if not explicit, disavowment of the notion that difficulties of proof are a sufficient or indeed rational basis for discriminating against illegitimates."

With regard to proving paternity, the Fifth Circuit goes on to say:

> "That problem, however, concerns burden of proof. Plainly the problem of proving parentage was viewed as a procedural matter which, of itself, was not sufficient justification for the state to formulate

classifications between legitimates and illegitimates based upon it."

The Fifth Circuit cites this Court's Decision in *Weber* v. *Aetna Casualty & Surety Company*, 406 U.S. 164 (1972).

The Georgia Supreme Court attempted to justify its assertion in this area by concluding:

> "In most circumstances it is the mother, not the father, who raises and cares for the illegitimate child." (See Jurisdictional Statement—Page 7a)

The Georgia Supreme Court, again relying on the norm, concluded:

> "More often than not, the father of an illegitimate child who has elected neither to marry the mother nor to legitimate the child pursuant to proper legal proceedings, suffers no real loss from the child's wrongful death." (See Jurisdictional Statement—Page 4a)

Finally the Georgia Supreme Court justifies the assertion of this interest by stating:

> "Moreover, the father of the illegitimate child is usually the parent in this situation who has control over whether a legitimate family unit will exist." (See Jurisdictional Statement—Page 7a)

It should be noted that the Georgia Supreme Court relied on bare conclusions unsupported in any fashion. However, even given the validity of those assertions, those assertions do not address the Equal Protection Clause of the United States Constitution. The question before this Court is whether even given a situation as described by the Georgia Supreme Court as being the norm, can the State justify the total and absolute exclusion of every father of every illegitimate child in all circumstances from the maintenance of a wrongful death action?

The Decision of this Court and the Decision of Circuit Courts of Appeal would mandate an answer to the question stated above in the negative. The Fifth Circuit in *Beaty* v. *Weinberger*, supra, concluded:

> "We do not here dispute the Secretary's underlying premise that because illegitimate children are less likely to be supported by their fathers than h(2) children—a proposition which we are inclined to accept as true—the former might be required to establish to the satisfaction of the Secretary the entitling facts of parentage and support. Thus it would doubtless be appropriate for Congress to require that post-disability illegitimate children prove those facts. It does not follow, however, that the entire class may be excluded from coverage simply because of a postulated difficulty of proof."

Likewise this Court directly addressed this issue of total exclusion of the class based on the norm in *Stanley* v. *Illinois*, 405 U.S. 645 (1972). This Court concluded in that case:

> "It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children. This much the State readily concedes, and nothing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children."

This Court went on to conclude in *Stanley*, supra, at Page 657:

> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formali-

ties, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand."

The point made by this Court, by the Fifth Circuit Court of Appeals, and by the Appellant is that the Appellant in the present case had maintained a relationship with his child as meaningful as the relationship between any natural father and his child. To deny the existence of that relationship, either legally or biologically based on problems of proving paternity in most cases, cannot be defended consistent with the Equal Protection and Due Process Clauses of the United States Constitution.

Certainly the State may set exacting standards of proof and place the burden upon the illegitimate father to prove paternity. This suggestion was made by this Court in *Trimble* v. *Gordon*, supra, when the Court concluded:

"The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their father's estates than required either for illegitimate children claiming under their mother's estates or for legitimate children generally." (Page 465)

Likewise the State of Georgia may impose strict requirements with regard to proof of paternity and place the burden upon the father. But Appellant respectfully submits that the State of Georgia cannot deny this Appellant and every father of every illegitimate child the right to recover for the wrongful death of that child by asserting the burden of proof as a legitimate state interest.

Secondly, the Georgia Supreme Court justified its Opinion by reasoning that the State has an interest in encouraging the fathers of illegitimate children to take steps to legitimate the children and that the Appellant in the present matter had the option of legitimating the

child but failed to do so. (See Jurisdictional Statement —Page 4a). In the first instance the Court fails to explain why the state does not have a policy of encouraging mothers to legitimate illegitimate children and why therefore mothers of illegitimate children are allowed to bring actions for wrongful death without regard to legitimation. No justification is given for placing the entire responsibility for legitimation upon the father other than the bare conclusion that "the father of the illegitimate child is usually the parent in this situation who has control over whether a legitimate family unit will exist." (See Jurisdictional Statement—Page 7a) And the Court's bare conclusion that "the father of an illegitimate child who has neither married the mother nor legitimated the child suffers no real loss from the child's death." (See Jurisdictional Statement—Page 4a).

Appellant submits that the Georgia Supreme Court's position that the Appellant in the present case and any father of an illegitimate child who has neither married the mother nor legitimated the child suffers no real loss from the child's death is totally unsupportable. To conclude that a father such as the Appellant who signed the child's birth certificate, paid the child's birth expenses, supported the child, and visited with the child on a daily basis from its birth until its death (A-3 et seq) suffers no loss when that child is killed merely because he has not gone through the formal process of marriage or legitimation is totally indefensible.

More importantly, this Court has stated in the recent decision of *Trimble* v. *Gordon*, supra, a 1977 case, that a statute in violation of the Equal Protection Clause cannot be salvaged by the fact that alternatives exist which would allow one to avoid the impact of the unconstitutionality of the statute. In *Trimble*, supra, this Court ruled that Illinois could not, consistent with the Equal Protection Clause, deny an illegitimate child the

right to inherit by intestate succession from its father when it could so inherit from its mother.

The Illinois Supreme Court in *Trimble*, supra, had argued that the father of the illegitimate child could have left a Will, could have legitimated the daughter by marrying the mother and could have given the daughter the status of a legitimate child by stating in his acknowledgement of paternity his desire to legitimate her. This is precisely the position taken by the Georgia Supreme Court in the present matter. This Court rejected these contentions and concluded:

> "By focusing on the steps that an intestate might have taken to assure some inheritance for his illegitimate children, the analysis loses sight of the essential question: the constitutionality of discrimination against illegitimates in a state intestate succession law. If the decedent had written a Will devising property to his illegitimate child, the case no longer would involve intestate succession law at all. Similarly, if the decedent had legitimated the child by marrying the child's mother or by complying with the requirements of some other method of legitimation, the case no longer would involve discrimination against illegitimates. Hard questions cannot be avoided by a hypothetical reshuffling of the facts."

This Court went on to conclude:

> "Traditional equal protection analysis asks whether this statutory differentiation on the basis of illegitimacy is justified by the promotion of recognized state objectives. If the law cannot be sustained on this analysis, it is not clear how it can be saved by the absence of an insurmountable barrier to inheritance under other and hypothetical circumstances."

This Court has made it abundantly clear that the presence or absence of alternatives for avoiding the impact of statutes challenged on equal protection grounds is immaterial. Consequently, in the present case the fact

that the Appellant could have legitimated the child is of no consequence in deciding the constiutional validity of this challenged provision. As the Supreme Court stated in *Stanley* v. *Illinois*, 405 U.S. 645 (1972):

> "At the outset, we reject any suggestion that we need not consider the propriety of the dependency proceedings that separated the Stanleys because Stanley might be able to regain custody of his children as a guardian or through adoption proceedings. The suggestion is that if Stanley has been treated differently from other parents, the difference is immaterial and not legally cognizable for the purposes of the Fourteenth Amendment. This Court has not, however, embraced the general proposition that a wrong may be done if it can be undone." (Page 647)

Appellant respectfully submits that a conclusion by this Court that Appellant is not entitled to maintain this action for wrongful death because he had the option of legitimating the child would be a triumph of form over substance. The Record reflects without contradiction that the Appellant in this case acknowledged his paternity of the child by execution of the birth certificate, paid the birth expenses, supported the child from its birth until its death and visited with the child on a daily basis. Surely an individual in Appellant's position would justifiably wonder what more he would need to do to legitimize such a child having acknowledged his paternity as a matter of record and having established a meaningful father-son relationship with the child (A-3 et seq).

In discussing Louisiana's Workmen's Compensation Law and in finding that Law in violation of the Equal Protection Clause, this Court addressed a distinction in Louisiana Law which allowed recovery where there was acknowledgement of the child, but denied recovery where there was no acknowledgement. See: *Weber* v. *Aetna Casualty & Surety Company*, 406 U.S. 164 (1972). In addressing this issue in that case the Court concluded:

> "Whatever the merits elsewhere of this contention, it is not compelling in a statutory compensation scheme where dependency on the deceased is a prerequisite to anyone's recovery and where the acknowledgement so necessary to equal recovery rights may be unlikely to occur or legally impossible to effectuate even where the illegitimate child may be nourished and loved."

That is perfectly analogous to the present situation where in his own mind Appellant had done all that was necessary to legitimate his child, having acknowledged that child by the execution of its birth certificate, having paid its birth expenses, having supported it from its birth until its death and having visited with it on a daily basis.

This Court previously addressed this same issue in the case of *Levy* v. *Louisiana*, 391 U.S. 68 (1968). In concluding that illegitimate children could not be denied the right to recover for the wrongful death of their mother consistent with the Equal Protection Clause, this Court concluded:

> "Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would."

Likewise in the present case the legitimacy or illegitimacy of Appellant's child bears no relation to the nature of the wrong inflicted upon the Appellant. The Record shows that Appellant cared for the child, that he nurtured the child and that in the child's death he suffered a wrong and a loss as fully as any natural parent.

For the foregoing reasons Appellant respectfully submits that the Georgia Supreme Court erred in asserting that the present classification may be sustained since Appellant could have avoided any unconstitutional impact by alternative means.

(B) Georgia Code Annotated § 105-1307 Does Not Promote And Is Not Reasonably Related To Any Legitimate State Interest Which May Exist.

Appellant has discussed two of the four interests contended by the Georgia Supreme Court to constitute legitimate state interest justifying the present classification. Appellant has demonstrated through decisions of this Court that the first two asserted legitimate state interests have been held in identical cases not to constitute sufficient justification for the total exclusion of illegitimates from a statutory scheme of recovery. With regard to the remaining two asserted legitimate state interests, Appellant will demonstrate that the present classification does not and can never be expected to promote those state interests.

The final legitimate state interests asserted by the Georgia Supreme Court have generally been considered valid state interests justifying certain classifications. The Georgia Supreme Court concluded that the State of Georgia has a legitimate state interest in promoting legitimate family relationships, in avoiding spurious claims and in setting a standard of morality. (See: Opinion of the Georgia Supreme Court, Jurisdictional Statement—Page 1a). Specifically the Georgia Supreme Court concluded:

> "Thus the state interest in promoting the family as an institution for child rearing and in setting standards of morality are arguably furthered by denying the wrongful death action to fathers of illegitimate children, although granting it to mothers."
>
> (Jurisdictional Statement—Page 7a)

This Court has rejected this logic in general and common sense rejects this logic in this case.

No one would contend that the interests asserted above are not worthy state interests. However, the Georgia Supreme Court totally fails to demonstrate how legitimate family relationships and high standards of morality are promoted by allowing one party to the illegitimate act to recover for the wrongful death of the child which was the product of that act and denying that right to the other party to the illegitimate act. Is the State of Georgia's interests in promoting legitimate family relationships and high standards of morality limited to punishing males who participate in these illegitimate acts, while rewarding the females who participate, by allowing the latter to recover and denying that right to the former? It is as Justice Hill stated in his Dissenting Opinion in the Georgia Supreme Court which is found in the Appendix at Page 8:

> "The majority fails to explain how the State's objective of promoting a legitimate family unit is furthered by denying the father of an illegitimate child an action for that child's wrongful death. The illegitimate child is already dead by the time the means chosen by the State comes into operation. The denial of a claim for a child's wrongful death does not promote the family as an institution for rearing that child in a timely or rational manner regardless of the level of scrutiny employed. The sanction adopted by the state is not suited and comes too late to motivate a father to provide care for his illegitimate child. It treats the father of an illegitimate child different from the mother of that same child and thus constitutes a denial of equal protection."

Justice Hill goes on to conclude in this Dissenting Opinion:

> "The majority seek to distinguish *Glona* v. *American Guarantee and Liability Ins. Co.*, supra, based on the difference in proving paternity vs. maternity, a ground which was expressly rejected in *Trimble* v. *Gordon*, supra, where the Court stated that although a state might adopt a more demanding standard of proof for fathers of illegitimate children than for mothers, the extreme means of complete exclusion of recovery was not permissible. Because I cannot accept at face value the tortfeasor's proffered state rationale or a distinction of *Glona* already rejected by the U. S. Supreme Court, I must respectfully dissent."

Appellant must respectfully submit that this case is controlled by this Court's decision in *Glona* v. *American Guaranty & Liability Insurance Company*, 391 U.S. 73 (1968). In that case this Court found the Louisiana Wrongful Death Statute to be in violation of the United States Constitution. By construction of Louisiana courts, the Louisiana Statute had excluded both the mother and father of illegitimate children from bringing actions for the wrongful death of those children. The issue decided by the Court is best stated in the words of the Court in Footnote 3 of that Opinion:

> ". . . As the Court of Appeals noted, Article 2315 of the Louisiana Civil Code, providing for wrongful death recovery, gives a cause of action to 'the surviving father and mother of the deceased, or either of them . . .' The statute does not state 'legitimate' father or 'legitimate' mother, but the Louisiana courts have held that a decedent must be legitimate in order for an ascendant or sibling to recover for his death."

In *Glona*, supra, this Court was confronted with an effort by the mother of an illegitimate child to bring an action for the wrongful death of that child. Appellant submits that the same reasoning used by the Court to allow the mother in that case to bring an action for the wrongful death of her child applies to the Appellant in the present case as the father of such a child. This Court concluded:

"Yet we see no possible rational basis for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death. A law which creates an open season on illegitimates in the area of automobile accidents gives a windfall to tortfeasors. But it hardly has a causal connection with the 'sin' which is we are told, the historic reason for the creation of the disability. To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a state to draw such 'legal' lines as it chooses." (Page 74)

Appellant submits that *Glona*, supra, stands for the proposition that parents of illegitimate children may not be treated differently from parents of legitimate children consistent with the Equal Protection and Due Process Clauses of the United States Constitution.

This Court additionally addressed the ability of such a classification as the present one to promote the legitimate state interest of avoiding spurious claims. In *Jiminez* v. *Weinberger*, 417 U.S. 504 (1974) this Court stated:

"We recognize that the prevention of spurious claims is a legitimate governmental interest and that dependency of illegitimates in appellants' subclass, as defined under the federal statute, has not been legally established even though, as here, paternity has been acknowledged."

Recognizing this, this Court went on to conclude in *Jiminez*, supra:

". . . It does not follow, however, that the blanket and conclusive exclusion of appellants' subclass of illegitimates is reasonably related to the prevention of spurious claims."

Likewise, in *Weber* v. *Aetna Casualty & Surety Company*, supra, this Court concluded:

". . . Nor can it be thought here that persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation."

The point to be made is that whether the state's interests be phrased as that of promoting legitimate family relationships, insuring a high standard of morality or preventing spurious claims, this Court has uniformly acknowledged that classifications like the present one do nothing to promote those state interests and consequently cannot sustain a challenge based on the Equal Protection Clause of the United States Constitution.

Georgia Law imposes the primary support obligation for illegitimate children on the father of those children. *Georgia Code Annotated* § 74-202 provides:

"§ *74-202 Father's Obligation to Support.*

The father of an illegitimate child shall be bound to maintain him until said child reaches the age of eighteen, marries or becomes selfsupporting, whichever occurs first. The obligation shall be good consideration to support a contract by him. He may voluntarily discharge this duty; if he shall fail or refuse to do it, the law will compel him: provided however, that the Superior Court shall have the power, upon petition of the father to require the mother of an illegitimate child to contribute to such support upon a determination that the financial circumstances of both the father and the mother are such that justice and equity require the mother to share in or have responsibility for such support."

That a state may constitutionally do this has been affirmed by this Court in *Gomez* v. *Perez*, 409 U.S. 535 (1973).

Consequently, we have reached a point where an illegitimate child may recover for the wrongful death of

its mother (*Levy*, supra); a mother may recover for the wrongful death of its illegitimate child (*Glona*, supra); an illegitimate child cannot be denied the right of inheritance from its father by intestate succession (*Trimble*, supra); the father of an illegitimate child can be held primarily responsible for its support (*Gomez*, supra; and *Georgia Code Annotated* § 74-202); illegitimate children cannot be denied workmen's compensation benefits because of their illegitimacy (*Weber*, supra); and the father of an illegitimate child is deemed to have protectable interest in his children (*Stanley*, supra).

Each of the above decisions was made upon equal protection grounds. Appellant respectfully submits that the collective effect of these decisions demands a finding that the Georgia Wrongful Death Statute also violates the Equal Protection Clause of the United States Constitution. Appellant submits that the state might have concluded justifiably that there should be a difference in the rights accorded children as the products of an illegitimate act, and the rights accorded the adults who are participants in that illegitimate act. However, Appellant respectfully submits that there is no justification by which the state can assert the promotion of legitimate family relationships and high standards of morality as a legitimate state interest; and thereby deny one party to an illegitimate act the right to recover for the wrongful death of the product of that act and yet award that right of recovery to the other participant in the same illegitimate act.

1) *The Decision of This Court In* Quilloin v. Walcott, *United States Supreme Court, Case No. 76-6372 Is Materially Distinguishable From the Present Case.*

In *Quilloin*, supra, this Court concluded that equal protection principles do not require that the authority of the father of an illegitimate child to veto an adoption

be measured by the same standard as is applied to a divorced father, from whose interests the former's are readily distinguishable. Appellant respectfully submits that that case is materially different from the present case. Certainly the State of Georgia may assert as a legitimate state interest the promotion of a legitimate family relationship. Certainly that state interest may be promoted by a classification which draws distinctions between the rights of divorced parents and parents of illegitimate children. That was the situation in *Quilloin*, supra. However, it is another matter entirely to demonstrate that the legitimate state interest of promoting family relationships is furthered by a classification like the present one which rewards one party to the illegitimate act and seeks to promote the legitimate state interest by punishing the other party to the illegitimate act. That is the present situation.

Appellant's position is that the State of Georgia might constitutionally have denied the mother and the father of illegitimate children the right to recover for the wrongful death of that child based on the asserted state interests of promoting legitimate family relationships. However, Appellant submits that the State of Georgia cannot constitutionally award the right of recovery to the mother of an illegitimate child and deny that same right to the father. In reality, either classification is probably constitutionally infirm in view of this Court's ruling in *Glona*, supra.

Quilloin, supra, is further distinguished by the very language of the Court. Justice Marshall speaking for the Court, states:

> "Although appellant was subject, for the years prior to these proceedings, to essentially the same child support obligation as a married father would have had, compare § 74-202 with § 74-105 and § 30-301, he has never exercised actual or legal custody

over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."

In the present case the Record demonstrates without contradiction through findings of fact by the trial court that the Appellant did shoulder significant responsibility with regard to the supervision, education, protection and care of his child. The Appellant acknowledged the child by executing the birth certificate, paid the birth expenses for the child, supported the child from its birth until its death and visited with the child on a daily basis. These facts alone render the present case materially distinguishable from *Quilloin*, supra, and *Quilloin* does not prevent a finding in the present case that the Georgia Wrongful Death Statute is in violation of the Equal Protection Clause of the United States Constitution.

2) ***The Arguments Advanced by the Appellee in the Supreme Court of Georgia Do Not Address the Issues Presently Before the Court.***

In his Motion to Dismiss filed in this Court and in the Georgia Supreme Court the Appellee makes two contentions which Appellant submits simply begs the question and totally fail to address the issue before this Court. Initially, the Appellee contends that the Georgia Legislature has provided for a method of recovery in cases like the present one without having to open "Pandora's box of proving paternity in the death action which would ultimately result if Appellant's position were upheld." In short, Appellee contends that because the Georgia Wrongful Death Statute allows the administratrix of the estate of the deceased child to bring an action for wrongful death, that it is not constitutionally infirm. Appellant submits that the question before this Court is not whether the state has provided an alternative scheme of recovery, but whether that alternative scheme

of recovery is consistent with the Equal Protection Clause of the United States Constitution.

Appellant contends that simply because the tortfeasor will not be allowed to go free, this Court should not be concerned with the Equal Protection Clause concerning the rights of the father of this illegitimate child. However, this Court has concluded to the contrary in *Weber* v. *Aetna Casualty & Surety Company*, 406 U.S. 164 (1972). The Court, per Mr. Justice Powell concluded:

> "The court below sought to distinguish *Levy* as involving a statute which absolutely excluded *all* illegitimates from recovery, whereas in the compensation statute in the instant case acknowledged illegitimates may recover equally with legitimate children and 'the unacknowledged illegitimate child is not *denied* a right to recover compensation, he being merely relegated to a less favorable position as are other dependent relatives such as parents . . ."

This Court went on to state in *Weber*, supra:

> ". . . The Louisiana Supreme Court likewise characterized *Levy* as a tort action where the tortfeasor escaped liability on the fortuity of the potential claimant's illegitimacy, whereas in the present action full compensation was rendered, and 'no tort feasor goes free because of the law.' "

This Court rejected that analysis and ruled in *Weber*, supra that:

> "We do not think *Levy* can be disposed of by such finely carved distinctions. The Court in *Levy* was not so much concerned with the tortfeasor going free as with the equality of treatment under the statutory recovery scheme. Here, as in *Levy*, there is impermissible discrimination."

Appellant respectfully submits that the foregoing logic and the foregoing analysis by this Court disposes of the Appellee's argument which simply begs rather than answers the question before the Court.

Secondly, Appellee contends in his Motion to Dismiss before this Court and contended in the Georgia Supreme Court that a ruling in favor of the Appellant in the present matter would simply create chaos since defendants would be exposed to possible double recovery. The Appellee contended in his Motion to Dismiss that "A defendant would be faced with the distinct possibility of paying twice or going to the problem and expense of attempting to locate a natural father which, after a period of time, would be practically impossible." This argument asserted by the Appellee simply will not survive even cursory analysis. With regard to the prospect of double recovery, Appellant points out that in *Glona*, supra, this Court declared that the mother of an illegitimate child may maintain an action for the child's wrongful death. Presumably, this ruling by the Court placed the mother of this illegitimate child ahead of some scheme of priority established by the State of Louisiana. That was done without creating the possibilty of double recovery since implicit in this Court's ruling that the mother was entitled to recover would be a ruling that she would be entitled to recover to the exclusion of all others and no defendant would be faced with the possibility of double recovery. Likewise, in *Levy*, supra, this Court ruled that illegitimate children may maintain an action for the wrongful death of their mother. Presumably, this finding in favor of the children, displaced a scheme of priority established by the state. It did so without creating chaos and without creating the prospect of double recovery.

As regards the Appellee's argument that a defendant may be put to the expense and difficulty of locating the natural father, states have found relatively simple ways and means of avoiding this problem. For example, in the State of Georgia the adoption statute provides for an attempt to notify the putative father of a child prior to adoption or at least allegations that the putative

father has failed, without justification, to support the child or to maintain any meaningful relationship with the child. See: *Georgia Code Annotated* § 74-406. This is a reasonable requirement since if a petitioner for adoption makes an effort to locate the putative father or through evidence proves that the putative father has not supported or maintained any relationship with the child, then at least that putative father has been accorded due process and equal protection under the law. On the other hand, if notice to the putative father results in the institution of proceedings by the putative father contending that he has supported the child and that he has maintained a meaningful relationship with the child then, likewise, the putative father has been accorded due process and equal protection under the law. Nothing would prevent the State of Georgia from the implementation of an identical scheme of recovery in the area of wrongful death.

In short, the Appellee fails to recognize any middle ground between absolute recovery for all fathers of illegitimate children and absolute exclusion of all fathers of illegitimate children when in reality, a middle ground is easily accessible which would also satisfy the Due Process and Equal Protection Clauses of the United States Constitution.

II.

THE GEORGIA WRONGFUL DEATH STATUTE WHICH ALLOWS THE MOTHER OF AN ILLEGITIMATE CHILD TO RECOVER FOR ITS WRONGFUL DEATH BUT DENIES THAT RIGHT TO THE FATHER CONSTITUTES IMPERMISSIBLE DISCRIMINATION BASED ON SEX.

Since *Reed* v. *Reed*, 404 U.S. 71 (1971), this Court has emphasized that statutory classifications that distinguish between males and females are subject to scrutiny under the Equal Protection Clause. The Court further indicated that:

> "To withstand constitutional challenge previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." (*Craig* v. *Boren*, 429 U.S. 190 (1976))

Finally this Court has insisted that gender-based legislative classification, premised on overbroad generalization concerning the behavior, proclivities and preferences of the two sexes, cannot be tolerated under the Constitution. *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); and *Stanton* v. *Stanton*, 421 U.S. 7 (1975).

The decision of the Georgia Supreme Court in this case is replete with the kind of overbroad generalizations and assumptions about "the way men and women are", a premise this Court has uniformly rejected. In its Opinion the Georgia Supreme Court justified its decision by concluding that the state has a legitimate state interest in encouraging fathers of illegitimate children to legitimate the child by petition or by marrying the mother. The Court totally failed to address the responsibility of the mother in this situation and allows her the right to

recover for the wrongful death of her child without regard to an effort to legitimate the child by petition or an effort to marry the father. The Court went on to conclude without documenting that "in most circumstances it is the mother, not the father, who raises and cares for the illegitimate child." Finally, the Court concludes with the archaic notion that the father of the illegitimate child is usually the parent in this situation who has control over whether a legitimate family unit will exist. (See Georgia Supreme Court Opinion, Jurisdictional Statement—Page 7a).

The present case demonstrates the absolute fallacy of the overbroad generalizations engaged in by the Georgia Supreme Court. The Appellant in the present case is at the opposite extreme of illegitimate fathers as depicted by the Georgia Supreme Court. This Appellant maintained a meaningful relationship with his child from its birth until its death, supported the child from its birth until its death and acknowledged the child as his own by executing the birth certificate and paying the birth expenses and giving the child his name. This case alone demonstrates the fallacy of conclusive and irrebuttable presumptions with regard to the behavior of all fathers of illegitimate children.

In this case unlike the other cases involving gender-based discrimination decided by this Court, there is no statistical evidence to support the overbroad conclusions of the Georgia Supreme Court. For instance, in *Reed*, supra, the proposition that men have more business experience than women was not without empirical support. Likewise in *Frontiero*, supra, and *Weinberger*, supra, the statistics tendered by the government to document mens' non-dependency and their labor market orientation were considerably more impressive than the naked generalized assertion offered by the Georgia Supreme Court in the case at bar. This Court has not favored the maintenance

of classifications of this type based on statistical analysis even when offered. In *Craig* v. *Boren*, supra, this Court concluded:

> "There is no reason to belabor this line of analysis. It is unrealistic to expect either the members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause."

The Court went on to conclude in *Craig* v. *Boren*, supra:

> "In sum the principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose fitting generalities concerning the drinking tendencies of aggregate groups."

Unlike *Craig* v. *Boren*, supra, no statistics were offered to prove the generalizations in the present case and Appellant submits that even if supported by empirical data, the loose fitting generalities engaged in by the Georgia Supreme Court do not warrant the present classification of the Georgia Legislature.

In *Califano* v. *Goldfarb*, 430 U.S. 199 (1977) this Court made it clear that in engaging in classifications, states cannot rely on "old notions such as assumptions as to dependency that are more consistent with the role-typing society has long imposed than with contemporary reality." This Court concluded in *Califano*, supra, that "such classifications, however, have frequently been revealed on analysis to rest only upon old notions and archaic and overbroad generalizations and so have been found to offend the prohibitions against denial of equal protection under the law."

Even assuming that, by some stretch of the imagination, the generalized interest asserted by the Georgia Supreme Court could be construed as legitimate objectives to be promoted by a gender-based classification, there is absolutely no showing and no logic which would support a conclusion that these objectives are promoted by the present classification. This Court has rejected arguments such as administrative convenience and burden of proof as constituting legitimate objectives in this area. See: *Califano* v. *Goldfarb*, 430 U.S. 199 (1977).

The remaining objectives loosely asserted by the Georgia Supreme Court are not documented and cannot possibly be promoted by the present classification. The Georgia Supreme Court as previously stated, indicates that the present classification might be construed to promote legitimate family relationships and high standards of morality. However, as pointed out by Justice Hill in his dissent, the majority never demonstrates how the present classification would operate to attain that objective. As Justice Hill points out, it is preposterous to assume that individuals would father illegitimate children in order that they might recover for their wrongful death. (See A-9).

Moreover, while the Legislature might arguably have attained its objectives by excluding both the mother and the father of illegitimate children, it is totally inconceivable that the objective of a legitimate family relationship could be promoted by allowing one party to the illegitimate act to recover for the wrongful death of the child and denying that right to the other party in all circumstances, creating an impermissible irrebuttable presumption.

Appellant respectfully submits that the present classification constitutes gender-based discrimination in violation of the Equal Protection Clause of the United States Constitution and based on the foregoing analysis and decisions cannot be constitutionally sustained.

CONCLUSION

The Georgia Wrongful Death Statute as embodied in Georgia Code Annotated § 105-1307 denies the Appellant and those similarly situated due process and equal protection of the law. Two of the allegedly valid State interests asserted by the Georgia Supreme Court have been rejected by this Court as insufficient to warrant the total statutory exclusion of a class of illegitimates. The previous decisions of the Court in this area demonstrate this Court's position that the remaining purported State interests asserted by the Georgia Supreme Court are not promoted by the present classification and could never be promoted by the present classification.

This Court's recent decision in *Quilloin* v. *Walcott*, supra, is readily distinguishable since it is one thing for a State to attempt to promote legitimate family relationships by discriminating between divorced parents and parents of illegitimate children. It is quite another to contend that that goal can be met by discriminating between two parties to the illegitimate act, allowing one of those parties to recover and denying that right to the remaining party.

Appellee's arguments concerning the prospect of being faced with double recovery and the prospect of having difficulty proving paternity and locating the illegitimate fathers simply beg the question and do not address the validity of the present classification and its consistency or inconsistency with the Equal Protection Clause of the United States Constitution.

The present classification as embodied in the Georgia Wrongful Death Statute constitutes impermissible gender-based discrimination in violation of the Equal Protection Clause. The Georgia Supreme Court and the Appellee both fail to demonstrate what important governmental objectives are promoted by this classification and totally

fail to demonstrate any manner in which this classification could possibly be construed to promote any important governmental objectives. Moreover the present decision consist merely of overbroad generalizations concerning the behavior and proclivity of the two sexes which this Court has consistently refused to tolerate.

For the foregoing reasons, Appellant respectfully submits that the Decision of the Georgia Supreme Court should be reversed. This Court should find that the Georgia Wrongful Death Statute as embodied in Georgia Code Annotated § 105-1307 denies the Appellant and those similarly situated due process and equal protection of the laws and the Appellant should be declared entitled to recover for the wrongful death of his child as initially decreed by the trial court in the Superior Court of Richmond County, Georgia.

Respectfully submitted,

TISINGER, TISINGER & VANCE
A PROFESSIONAL CORPORATION

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State of Georgia and the
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/s/ Thomas E. Greer
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Supreme Court, U. S.
FILED
NOV 16 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-3

CURTIS PARHAM,
Appellant

v.

ELLIS FRANKLIN HUGHES,
Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

JURISDICTIONAL STATEMENT FILED JULY 3, 1978
PROBABLE JURISDICTION NOTED OCTOBER 2, 1978

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UNITED STATES SUPREME COURT

No. 78-3

CURTIS PARHAM,
Appellant
v.
ELLIS FRANKLIN HUGHES,
Appellee

CHRONOLOGICAL LIST OF PLEADINGS

(This Chronological List of Pleadings is provided in lieu of Docket Entries due to the fact that the Docket Entries are practically illegible.)

NATURE OF PLEADING OR RULING	DATE FILED
1. Original Complaint for Wrongful Death in Superior Court, Richmond County, Georgia	2-7-77
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4. Answers to Requests for Admissions by Plaintiff	5-16-77
5. Motion for Summary Judgment by Defendant	7-18-77
6. Affidavit of Plaintiff in Opposition to Motion for Summary Judgment	8-29-77
7. Order denying Motion for Summary Judgment and finding Georgia's Wrongful Death Statute in violation of the United States Constitution	9-20-77
8. Order for Certificate of Immediate Review	9-20-77

NATURE OF PLEADING OR RULING	DATE FILED
9. Notice of Appeal to Georgia Supreme Court	10-19-77
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11. Motion for Rehearing in Georgia Supreme Court and Brief	4-12-78
12. Denial of Motion for Rehearing	4-19-78
13. Notice of Appeal to the United States Supreme Court	4-28-78
14. Probable Jurisdiction noted	10-2-78

IN THE SUPERIOR COURT FOR THE
COUNTY OF RICHMOND
STATE OF GEORGIA

Civil Action

File No. 5643-C

CURTIS PARHAM,
Plaintiff

vs.

ELLIS FRANKLIN HUGHES,
Defendant

ORDER

The defendant, Ellis Franklin Hughes, having filed a motion for summary judgment in the case styled above, and the same having come on for hearing on September 1st, 1977, and both parties having been represented by counsel, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1.

Curtis Parham is the natural father of Lemuel Parham, deceased, said minor child having been killed in an automobile accident on or about December 30, 1976.

2.

That the natural mother of said minor child, Cassandra Moreen, was killed in the same accident which claimed the life of the minor child, Lemuel Parham.

3.

That the deceased minor child Lemuel Parham was an illegitimate child, having been born to Curtis Parham and Cassandra Moreen, out of wedlock.

4.

That although Curtis Parham, the natural father of the child, never married Cassandra Moreen, the natural mother of said child, Curtis Parham did execute the birth certificate acknowledging paternity of the child. In addition, Curtis Parham paid the birth expenses for the birth of Lemuel Parham and had regularly supported said child from its birth until its death.

5.

That Curtis Parham at all times acknowledged the child as his son and was at all times acknowledged by the child as his father and in addition to paying child support, Curtis Parham maintained charge accounts at grocery stores for food and other necessities to further insure the support of his child.

6.

That Curtis Parham visited regularly with the deceased child and in fact saw him virtually every day and had the child with him on many weekends.

7.

That following the death of the minor child and the natural mother of the minor child in the collision identified herein, Curtis Parham instituted an action in the Superior Court of Richmond County, State of Georgia, for the wrongful death of the illegitimate child Lemuel Parham, asserting his rights to recover for the wrongful death of said child.

8.

That almost simultaneously, Estelle A. Moreen, maternal grandmother of the deceased minor child, in her capacity as Administratrix of the Estate of Lemuel

Parham, filed an identical action seeking to recover for the wrongful death of the minor child.

9.

That following the institution of the two actions for wrongful death identified above, Ellis Franklin Hughes, defendant in both actions, filed this motion for summary judgment against Curtis Parham contending that the plaintiff Curtis Parham was prohibited by law from bringing a wrongful death action for the death of his illegitimate son.

10.

That the Georgia Wrongful Death Statute presently provides that illegitimacy of the deceased child is not a bar to an action for wrongful death by the mother of said child. (See: Georgia Code Annotated § 105-1307).

11.

That the Georgia Legislature has placed primary responsibility for the support of illegitimate children upon the fathers of said children. (See: Georgia Code Annotated § 74-202).

CONCLUSIONS OF LAW

1.

To the extent that the Georgia Wrongful Death Statute conditions the right of either parent to sue for the wrongful death of its child upon the legitimacy or illegitimacy of the child, that Statute constitues a denial of equal protection and due process within the meaning of the 5th and 14th Amendments to the United States Constitution.

2.

To the extent that the Georgia Wrongful Death Statute purports to allow the mother of an illegitimate child to maintain an action for the wrongful death of that child and denies that right to the father of an illegitimate child, that Statute constitutes a denial of equal protection and due process in violation of the 5th and 14th Amendments to the United States Constitution.

3.

Where the state imposes the primary support obligation for illegitimate children upon the father of those children and where the father of an illegitimate child in fact has provided some level of support for that child and has acknowledged his paternity by execution of the birth certificate and has in every respect treated the child as his own, the State cannot constitutionally deny that father the right to maintain an action for the wrongful death of his child where the mother of said child is also deceased.

4.

The Court finds that Curtis Parham, natural father of the deceased illegitimate child Lemuel Parham, who has since the child's birth acknowledged his paternity, provided a level of support for said child and exercised extensive visitation with said child, is the proper person to maintain an action for the wrongful death of said minor child.

Based upon the foregoing Findings of Fact and Conclusions of Law, the motion for summary judgment filed by the defendant Ellis Franklin Hughes against the plaintiff, Curtis Parham, is hereby DENIED.

This the 13th day of September, 1977.

/s/ Franklin H. Pierce
FRANKLIN H. PIERCE
Judge
Richmond Superior Court
State of Georgia

IN THE SUPREME COURT OF GEORGIA

33071

HUGHES

v.

PARHAM

HILL, Justice, dissenting.

The majority fails to explain how the state's objective of promoting a legitimate family unit is furthered by denying the father of an illegitimate child an action for that child's wrongful death. The illegitimate child is already dead by the time the means chosen by the state comes into operation. The denial of a claim for a child's wrongful death does not promote the family as an institution for rearing that child in a timely or rational manner regardless of the level of scrutiny employed. The sanction adopted by the state is not suited and comes too late to motivate a father to provide care for his illegitimate child. It treats the father of an illegitimate child different from the mother of that same child and thus constitutes a denial of equal protection.

The majority seek to distinguish *Glona* v. *American Guarantee and Liability Ins. Co.*, supra, based on the difference in proving paternity vs. maternity, a ground which was expressly rejected in *Trimble* v. *Gordon*, supra, where the Court stated that although a state might adopt a more demanding standard of proof for fathers of illegitimate children than for mothers, the extreme means of complete exclusion of recovery was not permissible. Because I cannot accept at face value the tortfeasor's proffered state rationale or a distinction of *Glona* already rejected by the U.S. Supreme Court, I must respectfully dissent.

IN THE SUPREME COURT FOR THE STATE OF GEORGIA

Civil Action

File No. 33071

ELLIS FRANKLIN HUGHES,

Appellant

versus

CURTIS PARHAM,

Appellee

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

Notice is hereby given that Curtis Parham, the Appellee above named, hereby appeals to the Supreme Court of the United States from the Final Order of the Supreme Court for the State of Georgia upholding the validity of a Georgia Statute which had been found by the trial court to be repugnant to the Constitution of the United States, to-wit:

> The Supreme Court of the State of Georgia reversed a decision of the Superior Court of Richmond County, Georgia, which had sustained attacks on the Georgia Wrongful Death Statute made pursuant to the Equal Protection and Due Process Clauses of the United States Constitution and finding that Statute in violation of the Due Process and Equal Protection Clauses of the United States Constitution to the extent that it (a) conditioned the right of either parent to sue for the wrongful death of its child upon the legitimacy or illegitimacy of the child, (b) purports to allow the mother of an illegitimate child to maintain an action for the wrongful death of that child and denies that right to the father of an illegitimate child, (c) imposes the

primary support obligation for illegitimate children upon the father of those children and then where the father of an illegitimate child has, in fact, provided a level of support for that child, has acknowledged its paternity by execution of the birth certificate and has, in every respect, treated the child as his own, denies that father the right to maintain an action for the wrongful death of his child where the mother of said child is also deceased.

The Supreme Court for the State of Georgia reversed the Order of the Superior Court of Richmond County, Georgia, upholding the validity of the Georgia Wrongful Death Statute; which the trial court had held to be repugnant to the Constitution of the United States.

The decision of the Supreme Court for the State of Georgia, which is the subject of this Appeal, was entered on the 4th day of April, 1978. An Order denying Motion for Rehearing was entered on April 19, 1978.

This Appeal is taken pursuant to *28 United States Code 1257(2)*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas E. Greer, Counsel for the Appellee in the above styled action, do hereby certify that I have served a copy of the within and foregoing NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT upon:

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Administratrix of the Estate of
Lemuel Moreen Parham, Deceased
Minor Child)

The above listed parties are all parties which the *Rules* of the United States Supreme Court require service in compliance with *Rule 33* of the *Rules of the United States Supreme Court* by depositing a true and correct

copy of the same in the United States Mail, properly addressed, and with sufficient postage affixed thereon.

This the 26th day of April, 1978.

/s/ Thomas E. Greer
THOMAS E. GREER

(Attorney for the Appellee, Curtis Parham)

OTHER RELEVANT OPINIONS AND PLEADINGS APPEARING IN JURISDICTIONAL STATEMENT

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FOR ARGUMENT

Supreme Court, U. S.
FILED
DEC 18 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-3

CURTIS PARHAM,

Appellant,

versus

ELLIS FRANKLIN HUGHES,

Appellee.

Appeal from the Supreme Court
of the State of Georgia

BRIEF OF APPELLEE

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-3

CURTIS PARHAM,

Appellant,

versus

ELLIS FRANKLIN HUGHES,

Appellee.

Appeal from the Supreme Court of the
State of Georgia

BRIEF OF APPELLEE

SUPPLEMENT TO APPELLANT'S STATEMENT OF CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A.

Georgia Civil Code of 1910, §3012 (*Georgia Code Annotated* §74-101):

> §74-101 (3012) *What Children are Legitimate; Presumption; Legitimation by Marriage of Parents*
>
> All children born in wedlock, or within the usual period of gestation thereafter, are

legitimate. The legitimacy of a child thus born may be disputed. Where possibility of access exists, except in cases of divorce from bed and board, the strong presumption is in favor of legitimacy, and the proof should be clear to establish the contrary. If pregnancy existed at the time of the marriage, and a divorce is sought and obtained on that ground, the child, though born in wedlock, is not legitimate. *The marriage of the mother and reputed father of an illegitimate child, and the recognition of such child as his, shall render the child legitimate; and in such case the child shall immediately take the surname of his father.*

(Emphasis Added).

B.

Georgia Civil Code of 1910, §3013 (*Georgia Code Annotated* §74-103):

74-103 (3013) Legitimation by Order of Court; Petition; Notice of Proceedings

A father of an illegitimate child may render the same legitimate by petitioning the Superior Court of the county of his residence, setting forth the name, age, and sex of such child, and also the name of the mother; and if he desires the name changed, stating the new name, and praying the legitimation of such child. Of this application the mother, if alive,

shall have notice. Upon such application, presented and filed, the court may pass an order declaring said child to be legitimate, and capable of inheriting from the father in the same manner as if born in lawful wedlock, and the name by which he or she shall be known.

C.

Georgia Civil Code of 1910, §3028 (*Georgia Code Annotated* §74-203):

74-203 (3028) Mother's Rights

The mother of an illegitimate child shall be entitled to the possession of the child, unless the father shall legitimate him as before provided. Being the only recognized parent, she may exercise all the paternal power.

D.

1943 Georgia Laws, p. 538 (*Georgia Code Annotated* §74-204):

74-204 Judicial Discrimination on Account of Illegitimate Birth Prohibited

No court, commission or quasi-judicial body shall discriminate against any person because of his illegitimate birth.

E.

1943 Georgia Laws, p. 538 (*Georgia Code Annotated* §74-205):

> *74-205 Mother Suing for Injury or Death Not Discriminated against because of Child's Illegitimate Birth*
>
> The mother of an illegitimate child, in an action for damages arising out of injuries to or the death of her child — whether she sue in her own right or in her capacity as guardian, executor, or administrator — shall not be discriminated against because of such child's illegitimate birth.

F.

1924 Georgia Laws, p. 60; *1969 Georgia Laws*, p. 762 (*Georgia Code Annotated* §105-1309)

> *105-1309 Recovery by Administrator of Decedent*
>
> In cases where there is no person entitled to sue under the foregoing provisions of this Chapter, [the Georgia Wrongful Death Chapter], the administrator or executor of the decedent may sue for and recover and hold the amount recovered for the benefit of the next of kin. In any such case, the amount of the recovery shall be the full value of the life of the decedent.

SUPPLEMENT TO APPELLANT'S STATEMENT OF THE CASE

In his statement of the case, Appellant has failed to point out to this Court that he never legitimated the child pursuant to the provisions of *Georgia Code Annotated* §74-103 (*Georgia Civil Code of 1910* §3013) (R. 10, 12). Additionally, under the laws of the State of Georgia, it is a misdemeanor for the putative father of an illegitimate child to "abandon" said child, *i.e.*, fail to support, and if the accused father is convicted, he is required to pay the reasonable medical expenses incurred on behalf of the mother due to the birth of the child. *Georgia Code Annotated* §74-9902.

SUMMARY OF ARGUMENT

I.

Classifications based on illegitimacy are not "suspect" and justifications therefor are not required to survive "strict security". *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459 (1977). No case cited by the Appellant has ever held that the father of an illegitimate child has a right to bring an action for the alleged wrongful death of such child. In fact, of the fourteen cases decided by this Court dealing with illegitimacy, only three were concerned with the rights of the parents as opposed to the rights of the illegitimate children. *Glona v. American Guarantee and Liability Insurance Company*, 391 U.S. 73, 88 S.Ct. 1515 (1968), held that the mother of an illegitimate child could sue for the death of her child;

Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208 (1972) was concerned with a natural father who wanted the custody of his children and who was fighting for the right to rear and care for such children, thus easily distinguishable from the case at bar; and *Quilloin v. Walcott,* 98 S.Ct. 549 (1978) denied the right to the father of an illegitimate child to veto the adoption of said child.

Thus, it is Appellee's position that the decisions of this Court do not demand that the Constitution of the United States is offended by denying the natural father of an illegitimate child the right to bring an action for the alleged wrongful death of said child. Additionally, Appellee respectfully submits that the exclusion of fathers of illegitimate children from the benefits of a wrongful death action is substantially related to the legitimate state interest of avoiding problems with proof of paternity; of encouraging fathers of illegitimate children to legitimate their children; of encouraging settlements; of promoting legitimate family relationships; of avoiding spurious claims; and of setting a standard of morality.

II.

As the right to bring an action for wrongful death was unknown at common law, it is in derogation of the same and must be strictly construed. Since the mother of an illegitimate child is the only recognized parent and is granted full parental rights by *Georgia Code Annotated* §74-203 and as the father did nothing to legitimate his

child, Appellee respectfully submits that it is not an impermissible discrimination based upon sex to grant the mother of an illegitimate child the right to recover and not the father.

ARGUMENT AND CITATION OF AUTHORITY

I.

Georgia Code Annotated §105-1307 Does Not Violate The Due Process And Equal Protection Clauses Of The United States Constitution By Allowing The Mother Of An Illegitimate Child To Recover For That Child's Wrongful Death While Denying That Right To The Putative Father Of The Child.

Prior to considering Appellant's arguments posited under this section of his brief, Appellee would respectfully submit that classifications based on illegitimacy are not "suspect", and justifications are not required to survive "strict scrutiny." *Mathews v. Lucas,* 427 U.S. 495, 96 S.Ct. 2755 (1976); *Trimble v. Gordon,* 430 U.S. 762, 97 S.Ct. 1459 (1977). Furthermore, this Court has previously stated in *Trimble v. Gordon,* 430 U.S. 762, 97 S.Ct. 1459, 1465 (1977) that:

> 'The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust.

> Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrong-doing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual — as well as an unjust — way of deterring the parent.'. . .
>
> *The parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status.*

(Emphasis Added).

In not one of the cases cited by the Appellant has the United States Supreme Court ruled that the natural father of an illegitimate child has a right of action for the death of the child.

It should be noted that in 1977, this Court in *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, stated in footnote 11 of its opinion that said case represented the twelfth time since 1968 that this Court has considered the constitutionality of alleged discrimination on the basis of illegitimacy. Those decisions were cited as being: *Mathews v. Lucas*, 427 U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976); *Beaty v. Weinberger*, 478 F.2d 300 (CA 5, 1973), summarily aff'd, 418 U.S. 901, 94 S.Ct. 3190, 41 L.Ed.2d 1150 (1974); *Jimenez v. Weinberger*, 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed.2d 363 (1974); *New Jersey Welfare*

Rights Organization v. Cahill, 411 U.S. 619, 93 S.Ct. 1700, 36 L.Ed.2d 543 (1973); *Griffin v. Richardson*, 346 F.Supp. 1226 (Md.), summarily aff'd, 409 U.S. 1069, 93 S.Ct. 689, 34 L.Ed.2d 660 (1972); *Davis v. Richardson*, 342 F. Supp. 588 (Conn. 1972), aff'd 409 U.S. 1069, 93 S.Ct. 678, 34 L.Ed.2d 659 (1972); *Gomez v. Perez*, 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56 (1973); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972); *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971); *Glona v. American Guarantee and Liability Insurance Company*, 391 U.S. 73, 88 S.Ct. 1515, 20 L.Ed.2d 441 (1968); *Levy v. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968).In all of the cases with the single exception of *Glona, supra*, this Court dealt with the rights of an illegitimate child and not with the parents of said child. Although the Court did not cite *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208 (1972) as a case dealing with illegitimacy, Appellant has relied on *Stanley, supra*, as authority for certain of the propositions advocated by him. However, *Stanley, supra*, is easily distinguishable from the instant action as this Court was there concerned with a natural father of illegitimate children who wanted the custody of said children and who was fighting for the right to rear and care for such children. It is obvious that such rights are not before the Court at this time since the Appellant herein had never exercised any of the avenues available to him to remove the stigma of *filius nullius* from the deceased child and to obtain the custody of said child. Rather than making any attempt to gain full parental rights and to declare his illegitimate child a full and

recognized member of society, Appellant did nothing and only sought to utilize the processes of the law after the death of his child, in an action for damages.

As pointed out hereinabove, young Lemuel Parham had nothing to do with the circumstances of his birth and Appellee agrees that in accord with the decisions of this Court cited above, it would be unjust to deprive him, solely due to his illegitimacy, of any rights given to legitimate persons. However, we should bear in mind that we are not here dealing with the rights of the child but the rights of the father who had never sought to remove the legal epitaph from his child; and Appellee respectfully submits that depriving the natural father of an illegitimate child of the right to bring an action for damage for the alleged wrongful death of said child does bear "some rational relationship to legitimate state purposes."

Problems With Proof of Paternity

All of the cases cited by Appellant in Division I of his argument and citation of authority concerning the legitimate state interest in problems with proof of paternity deal with depriving illegitimate children of rights and benefits bestowed upon legitimate children. The State of Georgia in *Georgia Code Annotated* §74-204 has already statutorily recognized that an illegitimate child cannot be discriminated against because of its birth. Georgia also makes the mother the custodian of the child and rests all parental rights in her. *Georgia Code*

Annotated §74-203. Thus, the whole legislative scheme in Georgia is such that an illegitimate child is, as to himself, placed in the exact same position as a legitimate child, all of which is in line with the decisions of this Court and which incidentally, was done prior to 1968, the first decision of this Court concerning illegitimates. As the State has placed the custody of an illegitimate child and the obligation to rear said child in the hands of his mother (*Georgia Code Annotated* §74-203), the State has also awarded the right to that mother to bring an action for the alleged wrongful death of her illegitimate child.

Even though the Appellant makes a great issue of the fact that he paid the birth expenses and assisted in supporting the child, he fails to point out that, if he had not done so voluntarily, both the mother and the State could have forced him to do the same things. *Georgia Code Annotated* §§74-202; 74-9902. What right or benefit has the Appellant been deprived of by being denied the right to bring an action for the alleged wrongful death of his child? At common law, such a right for wrongful death was not granted to any person whomsoever, legitimate or illegitimate; such a right is granted only by statute and is to be strictly construed. *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 770 (5th Cir. 1976); *Thompson v. Watson*, 186 Georgia 396, 197 S.E. 774 (1938); *Lovett v. Garvin*, 232 Georgia 747, 208 S.E.2d 838 (1974). As such, Appellee respectfully contends that the problems of proving or disproving paternity in a case where practically anyone could come forward and claim to be the

father in order to share in or to reap the benefits of a wrongful death recovery without any of the attendant responsibilities is certainly a legitimate state interest to be protected and was so recognized by the Georgia Supreme Court in its opinion (Jurisdictional Statement - pages 1a, 3a and 4a).

Georgia Code Annotated §105-1309 provides for a recovery by the administrator or executor of the estate of a deceased person if there is no person entitled to sue under the other provisions of the Georgia Wrongful Death Statutes. No right of action for such a death has been denied. In fact, the grandmother of the deceased Lemuel Parham has qualified as administratrix and has brought an action for the death of said child pursuant to this very code section (R. 15-17). Appellant can certainly make a claim in the Probate Court for his share of any proceeds of recovery and fight his battle of paternity there without subjecting alleged tort feasors to complete uncertainty.

Additionally, another legitimate state interest to be served in denying the natural father of an illegitimate child, regardless of the amount of support provided to the child, the right to sue for the alleged wrongful death of the child, is the very legitimate and indeed practicable state interest of encouraging settlements of disputes between parties and in avoiding litigation and appeals.

In *Williams v. First National Bank of Pauls Valley*, 216 U.S. 582, 595 (1910), this Court stated that:

> Compromises of disputed claims are favored by the Court (Hennessy v. Baker, 137 U.S. 78 . . .).

If this Court were to rule, as requested by Appellant, that the natural father of an illegitimate child has a right of action for the death of the child, when there is no natural mother in life, no defendant could ever settle a case with certainty. Although in the case at bar, the natural father was known, this would obviously not be true in the vast majority of cases. A defendant would be faced with the distinct possibility of paying twice or going to the problem and expense of attempting to locate a natural father which, after a period of time, would be most difficult and perhaps impossible. Additionally, a holding that the natural father could bring an action for the death of an illegitimate child could cause a deluge of spurious and nuisance suits which a defendant would be compelled to defend in an attempt to prove lack of paternity. In such a case, because of the uncertainties involved, each alleged tort feasor would be compelled to await legal action which would have to be carried by appeal to final judgment by the highest appellate court so as to avoid being subjected to "double jeopardy".

Encouraging Fathers of Illegitimate Children to Legitimate Their Children

Appellee respectfully submits that the state's interest in encouraging fathers of illegitimate children to take the necessary steps which the legislature has provided to legitimate their children is a very real one and is rationally and reasonably related to excluding the fathers from bringing a wrongful death action for the alleged death of his children. Although Appellant argues that it is unreasonable that the state places the entire responsibility of legitimating children on fathers and not the mothers, Appellee would ask the Appellant just how is a mother supposed to legitimate a child? If a mother could legitimate a child, there would probably be no illegitimate children, except by choice, and the issues raised in this case would be moot. Obviously, the father is the only person who can legitimate a child. No matter how archaic it may appear, it is sound, practical and logical.

In support of his position that the legitimation of children is not a legitimate state interest served by the exclusion of the father from a wrongful death recovery, Appellant argues that the father suffered loss from the child's death. Althought the Appellant may have mourned the loss of his son and suffered grief, it is inconceivable to this Appellee that the Appellant would argue that he is entitled to recover for the death of the child when he neglected to legitimate the child when he could have easily done so by marry-

ing the mother or petitioning the court for legitimation. The same alternatives were available to the father in *Quilloin v. Walcott*, 98 S.Ct. 549 (1978) in order to grant the father of the illegitimate child in that case the right to veto the adoption of said child. The father had never exercised either of the alternatives, and this Court affirmed the Georgia statutes denying the father of an illegitimate child the right to veto the adoption of said child if the mother of the illegitimate child consents to the adoption.

The same state interest of rearing children in a family setting which was recognized and protected by this court in *Quilloin v. Walcott, supra*, is also a legitimate state interest to be protected in the case at bar. Since the mother is charged under Georgia law as the only recognized parent and is given exclusive authority to exercise all parental prerogatives (*Georgia Code Annotated* §74-203), she certainly should be accorded the right to consent to the adoption of the child and the right to bring an action for the alleged wrongful death of the child. If the father wishes to gain the same rights, Georgia has provided a method by which he can do so. If he fails to exercise his alternatives, this Court has held that he cannot veto the adoption of the child, and Appellee respectfully submits that it should hold that he cannot bring an action for the alleged wrongful death of the child. Is it too severe a penalty to impose upon a father who willingly allows his child to remain illegitimate, a status the child cannot change through any actions of his own, to deny that father the right to

bring an action for damages for the alleged wrongful death of said child? Appellee respectfully submits that the answer to this question is no.

Promoting Legitimate Family Relationships, Avoiding Spurious Claims and Setting a Standard of Morality

In attempting to demonstrate that the above are not legitimate state interests substantially related to excluding fathers of illegitimate children from the right to bring a wrongful death action, Appellant argues that these interests are not promoted by allowing one party to the illegitimate act from recovering while denying it to the other. Appellant refers continuously throughout his brief to punishing the males and rewarding the females. Although it may now be archaic and chauvinistic, Appellee would respectfully submit that the badge of shame and mortification borne by the mother of an illegitimate child is hardly offset by allowing her to recover for the death of said child. In most instances, the father does not share this shame and humiliation and, in fact, dodges the proverbial shotgun wedding like the plague. As the mother is the parent charged under Georgia law for the rearing of an illegitimate child, Appellee submits that the State of Georgia is entitled to exact a penalty from the father for not legitimating the child in the manner provided by law.

Appellant also argues that denying the father of an illegitimate child the right of an action for the alleged

wrongful death of the child does not promote the state's interests in rearing children in a family setting and in promoting a high standard of morality. However, Appellant fails to point out that the father of the deceased child in this case did not come forward and seek the benefits of the laws of the State of Georgia until the child was dead and a possible monetary benefit might be derived therefrom. Thus, how can it be said that the exclusion of the father from recovery is not an incentive to the father to marry the mother and legitimate the child?

Insofar as the legitimate state interest of avoiding spurious claims, Appellee can only say that if this Court were to rule in favor of the Appellant in this case, the red clay hills of Georgia will from time to time reverberate to the voices crying "I am the father", "I am the father" just as the hills of Rome rang with the cries "I am Spartacus" when the slave uprising against Rome was quelched and Spartacus was sought by the victorious general. No defendant, in the position of Appellee, could ever settle a case with certainty and could conceivably have to pay each putative father that came forward with a claim which he did not successfully defend unless the defendant went to final judgment. What a shameful waste of judicial process!

The Decision of this Court in Quilloin v. Walcott, *98 S.Ct. 549 (1978) Is Not Distinguishable And Should Be Controlling In This Case.*

Appellee respectfully submits that just as the father in *Quilloin, supra,* had never exercised actual or legal

custody over his child, the Appellant in this case never did either. Although he supposedly visited the child on a daily basis and paid support for the child, so did the father in *Quilloin v. Walcott*, Id. at 552-553. Although he may have visited the child, there is nothing in this record to support any allegation as maintained by the Appellant that he had "shouldered significant responsibility with regard to the supervision, education, protection and care of his child." Is the question of who can maintain a cause of action for the alleged wrongful death of an illegitimate child dependent upon such a finding of fact by a jury? Another jury considering the claims of another "father" may arrive at a different conclusion. What then? The mere fact that he visited with the child means nothing as is illustrated by this Court's opinion in *Quilloin, supra*, at page 553.

As this Court recognized in *Quilloin, supra*, the father in that case had the alternatives available to him to marry the mother or legitimate the child and did neither. Here, the appellant had the same alternatives and did nothing but now asks this Court to protect and to reward him for his inaction under the guise of equal protection and due process. Appellee respectfully submits that the state's interests cited by the Georgia Supreme Court in its opinion (Jurisdictional Statement, pages 1a-8a) are all substantially related to excluding the father of an illegitimate child from recovery for the alleged wrongful death of said child.

II.

The Georgia Wrongful Death Statute Which Allows The Mother Of An Illegitimate Child To Recover For Its Wrongful Death But Denies That Right To The Father Does Not Constitute Impermissible Discrimination Based On Sex.

As already pointed out, an action for wrongful death was unknown at common law and is purely a creature of statute. As such, it is within the legislature's power to provide who can and who cannot bring an action for the wrongful death of a child. Georgia has provided that the mother, if alive, is the exclusive party to bring an action for the alleged wrongful death of her child. This is true even if the mother and father are divorced and the father has exclusive custody of the children. Appellee respectfully submits that the Appellant stands in no better position than a divorced father who has exclusive control and custody of the children but is denied the right to bring an action for the death of the children by the Georgia Wrongful Death Statutes.

Appellant argues that the state interest of encouraging fathers of illegitimate children to legitimate the child by petition or by marrying the mother is not served by denying the father of the illegitimate child the right of bring an action for the alleged wrongful death of the child. He further argues that the Georgia Supreme Court did not discuss the fact that the mother was allowed to recover even though she did not have to

make an effort to legitimate the child or to marry the father and that the Supreme Court of Georgia had the rather archaic notion that the father of the illegitimate child is usually the parent who has control over whether a legitimate family unit will exist (See Georgia Supreme Court opinion, Jurisdictional Statement — page 7a). Again, Appellee would ask the Appellant how is the mother to legitimate the child by either petition or by marriage? There is simply no way that this could be done, and the Georgia law provides that the mother is the only recognized parent and is given exclusive authority to exercise all parental prerogatives (*Georgia Code Annotated* §74-203). This code section was discussed in *Quilloin, supra*. As the mother is the only recognized parent and as the father has done nothing to remove the stigma of *filius nullius* from the child, Appellee respectfully submits that denying him the right to recover is not an impermissible discrimination based on sex.

CONCLUSION

For the foregoing reasons, Appellee respectfully submits that the decision of the Georgia Supreme Court should be affirmed and that this Honorable Court should decide that the Georgia Wrongful Death Statute as set out in *Georgia Code Annotated* §105-1307 is not constitutionally infirm in any respect.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, A. Montague Miller, Counsel for the Appellee in the above styled action, do hereby certify that I have served three copies of the within and foregoing BRIEF OF APPELLEE upon:

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The above listed parties are all parties which the Rules of the United States Supreme Court require service in compliance with Rule 33 of the Rules of the United States Supreme Court by depositing three true and correct copies of the same in the United States Mail, properly addressed, and with sufficient postage affixed thereon.

This ____ day of December, 1978.

A. MONTAGUE MILLER
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